THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW

by

R. M. JACKSON, M.A., LL.B.

Solicitor of the Supreme Court of Judicature,
Lecturer in Law in the University of Cambridge

Wm. W. Gaunt & Sons, Inc.
Holmes Beach, Florida
1986

WM. W. GAUNT & SONS, INC.

First published 1936
Reprinted by permission of
Cambridge University Press

International Standard Book Number: 912004-48-7

Library of Congress Catalog Card Number: 85-81809

Reprint 1986

WM. W. GAUNT & SONS, INC.
Gaunt Building
3011 Gulf Drive
Holmes Beach, Florida 33510-2199
U.S.A.

CAMBRIDGE STUDIES IN ENGLISH LEGAL HISTORY

Edited by

HAROLD DEXTER HAZELTINE, LITT.D., F.B.A.

Of the Inner Temple, Barrister-at-Law;
Downing Professor of the Laws of England in
the University of Cambridge

CAMBRIDGE STUDIES IN ENGLISH LEGAL HISTORY

Edited by HAROLD DEXTER HAZELTINE, LITT.D., F.B.A., of the Inner Temple, Barrister-at-Law, Downing Professor of the Laws of England in the University of Cambridge.

THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE. By PERCY HENRY WINFIELD, LL.D., of the Inner Temple, Barrister-at-Law; Fellow of St John's College, and Rouse Ball Professor of English Law, Cambridge. 1921.

STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY. By THEODORE F. T. PLUCKNETT, M.A., LL.B., Professor of Legal History in the University of London; sometime Assistant Professor of Legal History in Harvard University. 1922.

INTERPRETATIONS OF LEGAL HISTORY. By ROSCOE POUND, PH.D., LL.D., Carter Professor of Jurisprudence in Harvard University. 1923.

IOANNIS SELDENI *AD FLETAM DISSERTATIO.* Reprinted from the edition of 1647 with parallel translation, introduction and notes by DAVID OGG, Fellow and Tutor of New College, Oxford. 1925.

A MANUAL OF YEAR BOOK STUDIES. By WILLIAM CRADDOCK BOLLAND, M.A., LL.D., of Lincoln's Inn, Barrister-at-Law; late Sandars Reader in the University of Cambridge, and Scholar of Magdalene College, Cambridge. 1925.

ANGLO-SAXON WILLS. Edited with translation and notes by DOROTHY WHITELOCK, M.A., Lecturer at St Hilda's College, Oxford. 1930.

THE EQUITY OF REDEMPTION. Its Nature, History and Connection with equitable estates generally. By R. W. TURNER, M.A., LL.M., Tutor in Law, University College of the South-West, Exeter. 1931.

RADULPHI DE HENGHAM *SUMMAE.* Edited by WILLIAM HUSE DUNHAM, Jr., Assistant Professor of History, Yale University. 1932.

A HUNDRED YEARS OF QUARTER SESSIONS. The Government of Middlesex from 1660 to 1760. By E. G. DOWDELL, Lecturer in Economics at St John's College, Oxford. With an Introduction by SIR WILLIAM HOLDSWORTH, K.C., D.C.L., HON.LL.D., Vinerian Professor of English Law in the University of Oxford. 1932.

THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW. By R. M. JACKSON, M.A., LL.B., Solicitor of the Supreme Court of Judicature, Lecturer in Law in the University of Cambridge. 1936.

THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW

by

R. M. JACKSON, M.A., LL.B.

Solicitor of the Supreme Court of Judicature,
Lecturer in Law in the University of Cambridge

CAMBRIDGE
AT THE UNIVERSITY PRESS
1936

LONDON
Cambridge University Press
FETTER LANE

NEW YORK • TORONTO
BOMBAY • CALCUTTA • MADRAS
Macmillan

TOKYO
Maruzen Company Ltd

PRINTED IN GREAT BRITAIN

CONTENTS

Editor's Preface: Quasi-Contractual Obligations, *By* H. D. Hazeltine — *page* ix

Author's Preface — xxi

Index of Year Books — xxv

Index of Cases — xxvii

Index of Statutes — xxxiii

List of modern authorities referred to by abbreviated titles — xxxv

Part I

Before the rise of indebitatus assumpsit in the seventeenth century

1. General — 3

2. Rights of indemnity or contribution where the plaintiff has been compelled to pay another's debt, or discharge another's liability — 4

3. Recovery of money paid by mistake — 6

4. Money obtained from the plaintiff by extortion or fraud — 7

5. The obligation of a joint tenant or tenant in common to account for receiving more than his just share of profits — 18

6. Money paid for an executory consideration which wholly fails — 18

7. Money or goods deposited for a particular business (other than with a stakeholder) may be recovered at any time before they have been parted with by the holder in due fulfilment of his instructions — 24

8. Quantum meruit — 27

9. Account stated — 27

10. The obligation to satisfy a judgment — 28

11. Money due under statute, custom, or official duty *page* 29
12. Duties arising from a public calling or profession 29
13. Recovery of money paid or for services rendered to a third person at request of the defendant 30
14. When *A* has delivered goods or money to *B* for the benefit of *C*, then *C* has a right of action against *B* 30
15. The nature of action of account 32
16. The use of action of debt instead of action of account, and the virtual disappearance of account as a common law action 34

Part II

From the rise of indebitatus assumpsit to the settlement of the main principles

17. General 39
18. The rise of indebitatus assumpsit generally 39
19. Consideration in indebitatus assumpsit 42
20. Claims for "Money Paid" 46
(1) Where the plaintiff has been compelled to pay money which should have been paid by the defendant 51
(2) Contribution 55
21. Recovery of money paid by mistake 58
22. Indebitatus assumpsit against a wrongdoer 61
(1) Cases where the defendant has wrongfully obtained from a third person money due from the third person to the plaintiff 61
(2) Cases where the defendant has wrongfully compelled the plaintiff to pay money that was not due 64
(3) Waiver of conversion, deceit and trespass 72
(4) The scope of waiver of tort 76
(5) The doctrine of election 81

23. Recovery of money on failure of consideration *page* 84
24. Quantum meruit 88
25. Recovery of money paid on an illegal consideration 88
26. Claims for money received by the defendant from a third person for transmission to the plaintiff 93
27. The liability of a stakeholder 103
28. Claims on an "account stated" 105
29. The duties of an agent 111
    (1) Breach of warranty of authority 111
    (2) Money paid by mistake, or paid under compulsion, to an agent 113
    (3) Money received by an agent under an illegal contract 115
    (4) Agency of necessity 117
30. The basis of claims for money had and received and money paid 117
31. Is quasi-contract in English law co-extensive with the old indebitatus counts? 124
32. The name "quasi-contract" 127

Index 131

EDITOR'S PREFACE
QUASI-CONTRACTUAL OBLIGATIONS

THE stimulation caused by an awakened interest in the scientific study of quasi-contractual obligations, first noticeable in the writings of Langdell, Ames, Keener, and other scholars of the late nineteenth century, has ultimately led to the beginnings of an enrichment of our legal literature upon this subject. Without dwelling upon the contributions made by other recent writers,[1] it is only fair to draw special attention to the great service rendered by Dr Winfield in clearly differentiating tort from quasi-contract and in marking out, on the basis of a masterly analysis, the frontiers of what he rightly describes as the "ill-explored country" occupied by quasi-contractual obligations in English law.[2] Mr Jackson now presents in the present volume a study of quasi-contract, written in the form of a history, which provides a background for Dr Winfield's survey of the existing law. By attentive regard to continuity in development Mr Jackson has disclosed to view some of the principal historical foundations upon which the present law has been built. He has shown us how, in the course of time, various obligations which do not fall into the categories of obligations created by contract or tort, such as the obligation of the receiver of money paid by mistake, have acquired their place in the law; and, in showing us the stages in this evolution, he has made at the same time an addition to our knowledge of the working of the medieval and modern system of original writs. Mr Jackson's book, composed in the critical and constructive spirit of his immediate predecessors, is based upon his own first-hand examination of the original authorities, notably the Year Books, the cases, and the statutes; and it is in fact the first detailed account of an important historical development, continuous from the time of Bracton to our own day, to make its appearance in the literature of English law.

[1] Of exceptional importance are the many passages upon the history of quasi-contract in Sir William Holdsworth's *History of English Law*.

[2] Winfield, *Province of the Law of Tort*, 1931, ch. VII: Tort and Quasi-Contract (pp. 116–89).

One of the thoughts which may easily arise in the mind of a reader of Mr Jackson's book is that English practitioners and judges appear to have found quasi-contracts, from the viewpoint of juridical analysis, a most difficult subject-matter. To explain the true nature of such extraordinary and peculiar obligations, and to assign to them, in their relation to other kinds of obligation, their proper place in the law, has seemed to many English lawyers an almost impossible task. One reason for this perplexity on the part of the medieval profession seems to lie in the fact that the quasi-contractual obligations of early English law[1] and the Roman legal system had not been studied by the English law-writers of the twelfth and thirteenth centuries. Even Bracton, while clear in his own mind as to the general nature of *obligatio* as a *vinculum iuris*,[2] contented himself, so far as *obligatio quasi ex contractu* was concerned, with a bare enumeration, drawn from Justinian's *Institutes*, of its several species.[3] In dealing with quasi-contracts the courts of common law in the medieval and early modern periods found, therefore, no theoretical guidance in the books at their disposal; and, as a result, they were compelled to develop in their own empirical way the law in respect to various miscellaneous obligations which came to be known, in later times, as "contracts implied in law", "constructive contracts", or "quasi-contracts". The judges developed the law in regard to these obligations, a law that was slowly emerging as something in the nature of an *addendum* to the law of contracts and torts, as a part of the law of actions begun by original writ; and, within the range of this development, the chief actions were account and debt. Although the law of quasi-contracts prior to the rise of indebitatus assumpsit seems to have been but rudimentary, it is yet clear that

[1] English law of pre-Conquest times recognised certain liabilities of a civil character based neither on contract nor on wrong-doing of a tortious character. In a later age such liabilities would have been treated as quasi-contractual obligations.

[2] Bracton, f. 99. On Bracton's classification of *obligationes* as *ex contractu vel quasi* and *ex maleficio vel quasi*, see Pollock and Maitland, *History of English Law*, 2nd ed. vol. II, p. 207.

[3] Bracton, f. 100b: Et sciendum quod quasi ex contractu nascuntur actiones, sicut negotiorum gestorum, tutelae, communi dividundo, familiae herciscundae, actio ex testamento, condictio indebiti, et huiusmodi. Cf. Justinian's *Institutes*, lib. III, tit. xxvii.

the action of account had certain quasi-contractual aspects and that the action of debt, already overworked in other directions, was used to enforce quasi-contracts; and it appears also, as Mr Jackson has shown us, that a quasi-contractual remedy similar to the Roman *condictio ob rem dati* was not unknown.[1]

One of the historical factors which led to the treatment of certain obligations as quasi-contractual, thus bringing them within the general category of contract, appears to have been the adoption by Bracton, Britton, and Fleta, of a classification of the various forms of personal action as being either actions *ex contractu* or actions *ex delicto*.[2] This twofold classification, transmitted from age to age as exhaustive, seems to have been more theoretical than practical; for, as Maitland has observed, "the attempt to distribute our personal forms under the two heads of contract and tort was never very successful or very important". But, while this seems clearly to have been the general result, the view is frequently expressed by scholars that, so far as quasi-contracts are concerned, the outcome of the twofold classification of personal actions was to force all liquidated pecuniary obligations of non-contractual and non-tortious character into the contractual class of obligations enforced by personal actions *ex contractu*.[3] This grouping of contracts and quasi-contracts under the same heading, for the purposes of the adjective law, was effected as time went on by means of the fiction that quasi-contracts, although in fact obligations imposed by the law apart from contractual agreement, were "contracts implied in law", "constructive contracts". The obligor was treated *as if* he had made a contract with the obligee; and, since the obligation was so regarded, the obligee was entitled to bring the actions *ex contractu* against the obligor. Even though the twofold classification of the personal actions may not have had conscious influence upon the minds of the judges who were engaged in deciding

[1] See pp. 20, 24, *infra*.

[2] On this classification, see Maitland's note on the classification of the forms of personal action (Pollock, *Law of Torts*, 13th ed. 1929, Appendix A, pp. 585–92; and *Equity: Also the Forms of Action at Common Law*, 1909, pp. 367–70).

[3] See, e.g. Salmond, *Essays in Jurisprudence and Legal History*, 1891, pp. 177–8, and *Jurisprudence*, 8th ed. by C. A. W. Manning, 1930, p. 493.

cases involving quasi-contract, the fact remains, however, that the chief remedies for the enforcement of such obligations have always been actions which are, in their nature, essentially actions *ex contractu*.

Faced by the difficulties incident to the historical treatment of a branch of our law both complicated and ill-defined, Mr Jackson has wisely chosen to present the subject-matter under headings which stress the character of the several species of quasi-contractual obligation rather than the procedural remedies that enforce them. At the same time, within each of the two main periods into which the development naturally falls, he has dealt in an admirable manner with the adjective law; and, indeed, owing to the fundamental importance of the writ-system as the main factor in the growth of the substantive common law, a study of the nature and scope of the several forms of personal action was unavoidable. Thus, in sketching the period before the rise of the action of indebitatus assumpsit in the seventeenth century, Mr Jackson has devoted much space to the history of the action of account; and by so doing he has increased our knowledge of one of the important personal actions of the medieval period.[1] Holding that within the field occupied by quasi-contract the action of debt gradually superseded the action of account, which, owing to the growth of chancery jurisdiction in account, gradually fell into disuse, Mr Jackson has then passed into the period, from the late seventeenth century onwards, when the action of indebitatus assumpsit, developing as a remedy in contract, was extended in its scope to include quasi-contracts as well. In this later period, which reaches to the settlement of the main principles of quasi-contract by the courts, the action of indebitatus assumpsit was, as Mr Jackson has shown us so clearly, the dominant factor in the evolution of this branch of the law.[2] It is this part of the book, wherein the views of great judges, such as Holt, Mansfield, and Ellenborough play a prominent rôle, which will be read with the greatest interest by

[1] Mr Jackson's criticism of Langdell's theory of account, as set forth in his *Equity Jurisdiction*, will not escape the reader. See pp. 32–4, *infra*.

[2] See p. 39, *infra*. As Mr Jackson has observed, there are some "quasi-contractual claims that are not descendants of the old indebitatus counts"; pp. 124–7, *infra*.

lawyers concerned with practice, for in it Mr Jackson has reached the point of time when the details of the present law of quasi-contract were beginning to find their elaboration in the cases.

Although Mr Jackson has restricted his study to the history of quasi-contract at common law,[1] his few references to the jurisdiction of courts of equity in former times[2] suggest that in this direction there is a field for future research.[3] In early times the jurisdiction of the King's council as a court and of the King's chancery as a court was broad enough to include many of the matters which in later ages fell to the jurisdiction of the courts of common law; and it is clear that problems relating to obligations in the nature of quasi-contract came before them on various grounds. While it is possible that an examination might reveal nothing of importance for the history of quasi-contracts, it would nevertheless seem desirable to inquire into the cases where chancery in its earlier development had to deal with questions of compensation or damages; and in this connection attention may be drawn to the jurisdiction of chancery to ascertain compensation or damages by directing an issue, *quantum damnificatus*, to be tried either by a jury or by a chief clerk of chancery.[4] Again, it is at least worthy of notice that the common law duty or liability of the sheriff with respect to monies in his hands, which has been regarded in the past as of quasi-contractual character,[5] seems to find a parallel in the treatment of that duty by the chancery.[6] A special study of chancery juris-

[1] The Statute of Frauds has not affected the common law principles relative to quasi-contracts. See Williams, *The Statute of Frauds Section Four in the Light of its Judicial Interpretation*, 1932, pp. 212–20.

[2] See pp. 4, 55–6, 96–7, 121, *infra*.

[3] An entirely different matter is the incorporation of equitable ideas into the common law of quasi-contracts by Lord Mansfield and other judges.

[4] See Story, *Equity Jurisprudence*, 2nd English ed. (W. E. Grigsby), 1892, §§ 794–799c.

[5] See Keener, *Quasi-Contracts*, 1893, p. 19; Winfield, *op. cit.* pp. 141, 151–4; and cf. pp. 125–7, *infra*. Dr Winfield holds that the sheriff's liability should now be regarded as tortious rather than quasi-contractual; he places it among the "pseudo-quasi-contracts".

[6] Thus, for example, in the chancery case of *Rosewell v. English and Others*, 1618–19, the defendant had caused an execution to issue by virtue of which the sheriff compelled the plaintiff to pay the amount of the judgment debt. In accordance with the practice of the court to stay money levied by execution after it had passed into the hands of the sheriff, a practice certified by

diction, from the viewpoint of quasi-contract, might well reveal many cases of historical interest.

Doctrine in regard to the nature of quasi-contractual obligation has not yet attained perfection; and, indeed, the theoretical basis of the obligation is still in dispute.[1] In the history of the changing currents of thought in regard to this matter, a process which has been continuous from Lord Holt's time to our own, the ideas of Lord Mansfield, standing out prominently, form a bridge between the earlier and the later doctrines. By turning the minds of lawyers from the theory of fictitious contract to a theory based on considerations of natural justice and *aequum et bonum*, Mansfield introduced into the study of quasi-contract certain notions of an equitable character which, still of influence, have given to the obligation, from some points of view, the appearance of an equitable institution enforced by common law remedies.[2] Even though Mansfield did not fully succeed in placing doctrine on its modern basis, he was the founder of a new school of thought and has had many disciples. It is this transition in thought, inaugurated by Mansfield, which lends much of its interest to quasi-contract from a theoretical standpoint; and of this feature of the development in modern times Mr Jackson has much to say in his learned essay.[3]

One reason why the theory of quasi-contract has received so little attention at the hands of English legal writers seems to lurk behind the fact that for the most part they have written for practitioners, men concerned only with the immediate legal problem raised by a particular set of facts; and, since their main and almost sole purpose has been to assemble precedents on separate subject-matters for the use of practising lawyers, in the

two of the six clerks, Bacon, L. C., ordered the sheriff, who had the money in his hands, to bring it into court for repayment to the plaintiff; and this order was obeyed. See *Reports of Cases decided by Lord Bacon*, prepared by John Ritchie, 1932, p. 145.

[1] One can scarcely reach a different opinion after reading Dr Winfield's account of the present-day law.

[2] This has been observed by Dr Hanbury in his *Modern Equity*, 1935, p. 93. In Mr C. K. Allen's view, Mansfield rightly saw that "the whole basis of quasi-contract is equitable": *Law in the Making*, 2nd ed. 1930, p. 229.

[3] On Lord Sumner's and Lord Justice Scrutton's criticism of Mansfield's theory of quasi-contract, see Winfield, *op. cit.* pp. 131 ff.

spirit of those who had compiled the abridgements, writers of text-books have but rarely brought all branches of the law of obligations within the scope of their treatment. They have developed, therefore, no doctrine to cover all the obligations known to the law. Contracts, torts, and quasi-contracts have usually been expounded by common lawyers as separate subject-matters, while equitable obligations have received the attention of still another group of writers versed in the doctrines elaborated by the chancery. This disparate treatment of the several parts of our system of obligations, with little or no thought of seeking for similarities and differences, has resulted in a lack of coherence in theoretical expositions of the nature of quasi-contractual obligations.

Another factor, working to the same end throughout the centuries, has been the failure of English lawyers to reach any general agreement upon terminology. From the very beginning they have generally used the term *liability* as an indication of the *vinculum iuris* which fetters obligors; and frequently, indeed, they have employed the words *liability* and *duty* as equivalents. Liability and duty are, however, words of extensive import in English legal usage; and, while certain kinds of duties are spoken of as liabilities, in theory a distinction is sometimes to be drawn between duty and liability.[1] No doubt both words, liability and duty, may properly be used to express the fetter which binds the obligor under a quasi-contract; and the only point worth stressing here is that writers on the law of quasi-contracts should make it clear to the reader that they are using the two words interchangeably to express one and the same thing. Although Bracton used *obligatio* in its generic sense as including the several species of obligation,[2] the term soon acquired in English law a restricted meaning; and in this specialised sense it has been applied only to bonds, recognisances, and statutes merchant and staple.[3] It seems clear that this narrow meaning of *obligatio* has prevented the general employment of the terminology of obliga-

[1] See, e.g. Salmond, *Jurisprudence*, 8th ed. pp. 250–1.

[2] Bracton, ff. 99–101 b. On this part of Bracton's treatise, see Holdsworth, *op. cit.* vol. II, 3rd ed. pp. 275–8.

[3] See, e.g. Jacob, *Law-Dictionary*, 1736, s.v. Bond, Obligation, Recognizance, Statutes Merchant, Statutes Staple.

tion within the law of contracts, quasi-contracts, and torts. But, while it is easy to understand the historical reasons for the general abandonment of the terminology of the civilians by the common lawyers, it is worthy of notice that those reasons no longer exist; a "bond", for example, is now generally known under that term and is not called an "obligation" in any special sense. In Roman law *obligatio* had four meanings: (1) the act creating the relation between the parties; (2) the duty of the obligor; (3) the claim or right of the obligee; (4) the entire legal relation between the two parties thus bound together by duty on the one side and the corresponding right on the other side.[1] Certainly from the time of Lord Mansfield onwards a usage has been slowly forming whereby, in judgments and in books, the term "obligation" represents, as in Roman law, one or another of these four meanings; and both in the cases[2] and in the text-books[3] the term has often been so employed in reference to quasi-contracts. Thus, when stress has been laid on the "duty" or the "liability" of the obligor bound by a quasi-contract, the term "obligation" has been used in one, but only one, of its four Roman meanings. In English common law jurisdictions everywhere, however, as Sir Frederick Pollock has reminded us, "an unfortunate habit has arisen of using 'obligation' in a lax manner as co-extensive with duties of every kind"; and, now that a "bond" is no longer known specifically as an "obligation", it would be "convenient", Sir Frederick Pollock has proposed, "to restore 'obligation' to its Roman sense, for which there is no synonym".[4] The complete restoration of "obligation" to its Roman sense would mean, firstly, the abandonment of that term as an indication of duties other than those which properly fall within the scope of the law of obligations, namely, the law of torts, contracts, and quasi-contracts; and it would also mean,

[1] See Winscheid, *Pandektenrecht*, vol. II, 4th ed. 1875, §§ 251, 251a; Dernburg, *Pandekten*, vol. II, 6th ed. 1900, § 1, especially footnote 4, where the four meanings of *obligatio* are set out.

[2] See e.g. Keener, *op. cit. passim*; Winfield, *op. cit.* pp. 116–89, *passim*.

[3] See e.g. Jenks, *Digest of English Civil Law*, 1921, vol. I, pp. 315–25 (J. C. Miles).

[4] Pollock, *Jurisprudence*, 6th ed. 1929, pp. 86–8. By "'obligation' in its Roman sense" Sir Frederick Pollock means the "definite relation of claim and duty".

secondly, the employment of the word "obligation" in the four senses, already mentioned, of the Roman system. Without, however, pursuing this matter further, it may be remarked merely that the general laxity of English lawyers in respect of terminology seems to lie at the basis of much loose thinking in regard to the nature of obligations, not least of all those of quasi-contractual origin. The stress that has been laid, quite naturally and properly, on the "duty", the "liability", of obligors, including quasi-contractual obligors, has tended, moreover, to obscure from vision the notion of obligation as a legal bond between the obligor and the obligee, the tying together of the duty of the one party and the corresponding right of the other party. This is, in truth, the fundamental idea of obligation as a legal relation between two parties.[1] A critical and scholarly examination of English legal obligations from the standpoint of theory is one of the present-day needs of legal science; and such a study is, it is believed, the necessary preliminary to a complete understanding of the nature of the quasi-contracts that have become, in the course of history, a part of our legal system. In a study of that character the problem of terminology should not be, one may venture to suggest, neglected.

As a pioneer work within the field of quasi-contractual history, a development closely related to the history of contracts and torts, Mr Jackson's book is deserving of attentive perusal by all students of our legal system; and, moreover, to comparative legal historians, especially those who have knowledge of the Roman law of quasi-contracts and of Continental bodies of doctrine based upon it, the volume will also be of value. By comparison they will be able to see how the Roman and the English lawyers, starting with the same general problem, have reached results that are in some respects similar and in other particulars as strikingly dissimilar. In Roman law, for example, *negotiorum gestio* was treated as one of the *obligationes quasi ex contractu*;[2] and, although the principle of *negotiorum gestio* has never been a part of our common law, it has found a place in our maritime law

[1] On the Roman law, see Buckland, *Roman Law from Augustus to Justinian*, 2nd ed. 1932, pp. 405–7.

[2] Buckland, *op. cit.* pp. 537–9.

under the titles of salvage and general average. Although the obligation of the owner of a ship or the owner of cargo to pay compensation to the one who rescues his property from the perils of the sea is quasi-contractual and independent of contract, there is, however, no agreement among English judges upon the question whether the obligation arising from general average is contractual or quasi-contractual.[1] While many other differences between the Roman and the English law of quasi-contracts might easily be given, it must suffice to remark that, from an historical point of view, some of those differences seem to be due to the peculiarities attaching to the judicial machinery for the enforcement of quasi-contracts at Rome and in England; as, for example, the distinctions, in their nature, between the Roman *condictio* and the English action of indebitatus assumpsit. The English law of quasi-contracts has in fact developed with only slight influences derived from the Roman law; and hence, as an independent growth within its own native environment, diverging from the Roman law, it naturally displays certain marked differences from the earlier system. But in one respect the Roman and the English quasi-contracts are exactly alike: in each case they are miscellaneous obligations which seem to defy reduction to a common legal principle. Dr Buckland, in remarking that it seems impossible to find any principle to which the quasi-contracts mentioned by Justinian can be reduced,[2] has struck a note of pessimism, which will not be overlooked by English scholars seeking for a principle that will explain all the quasi-contracts of our own law. Although in practitioners' books there is in general an adherence to the theory of a contract implied in law,[3] a present-day tendency on the part of jurisprudential and historical writers to define quasi-contract in terms which exclude any reference to a basis in contract, whether

[1] See Winfield, *op. cit.* pp. 139, 155, 182; and pp. 124–7, *infra*.

[2] *Op. cit.* p. 537.

[3] See, e.g., Leake, *Principles of the Law of Contracts*, 8th ed., by R. R. A. Walker, 1931, pp. 44–94. Sir Frederick Pollock, writing for students as well as practitioners, has expressed himself in favour of the term "constructive contract", on the analogy of "constructive possession" and "constructive notice". See his edition of Maine's *Ancient Law*, 1906, pp. 375–6, and his *Principles of Contract*, 9th ed. 1921, pp. 14–15.

"fictional", "implied in law", or "constructive", is noticeable[1]; and it is possible that in this direction the solution of the quasi-contractual problem, from the viewpoint of theory, may yet be found.[2] In any event the readers of Mr Jackson's history will await with interest the appearance of his promised work on the principles of the present-day law; and it is possible that in that book he may be able to show us, by new lines of reasoning, how quasi-contract may be placed upon its true doctrinal basis.

H. D. H.

[1] Winfield, *op. cit.* p. 119: "So far as current English law is concerned, genuine quasi-contract signifies *liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit.*" Mr Jackson has adopted this definition; see p. xxiii, and, on the "duty" of the obligor, compare pp. 126, n. 4, 129, *infra*. Although the stress is upon the liability, the duty, of one party, there is implicit in this definition the notion of quasi-contract as an obligation in the sense of a legal relationship between the party liable to pay and the party who can enforce the payment.

[2] Dr Winfield has brought a solution nearer by distinguishing pure quasi-contracts from other forms of obligation which have been treated as "quasi-contracts" by most, if not all, of the earlier writers. See *op. cit.* pp. 148 ff.

AUTHOR'S PREFACE

THE FIRST PART of this book, dealing with the law down to the late seventeenth century, is in substance the Yorke Prize Essay for 1931. A few alterations have been made to the original essay, and some material omitted. The bulk of the second Part, dealing with subsequent developments, has been added.

There is no adequate account of quasi-contract in English law. There is a fair amount of guidance for the practitioner in Halsbury, *Laws of England*, and Bullen and Leake, *Precedents of Pleadings*,[1] but neither of those authorities can be called a systematic treatise on the topic. The only attempt to mark out the realm of quasi-contract is that of Professor Winfield in *The Province of the Law of Tort*, where he devotes a long chapter to this matter. What is completely lacking is any book which deals with both the nature and the detailed rules of quasi-contract. In the absence of standard works it is not surprising that the topic is somewhat unfamiliar, and that there is no generally accepted view of what constitutes quasi-contract. The confusion attending the notion of quasi-contract is long-standing; the name comes from the classification of obligations adopted by Justinian, where this heading was used to cover certain obligations that did not arise from contracts or delicts. The obligations that Justinian classed as quasi-contracts are perhaps analogous to contracts, but "It seems impossible to find any principle to which those he mentions can be reduced, or which, admitting these, will exclude a number which he does not mention".[2] This idea of a class of obligations not arising from delict or contract is present in English law, where we can describe quasi-contract, in rough outline, as consisting of liability not based on tort or

[1] Halsbury, *Laws of England*, 2nd ed. vii, under heading of "Constructive Contracts"; Bullen and Leake, *Pleadings*, 8th ed., under headings of "Money Paid" and "Money Received". Jenks, *Digest*, 2nd ed., ss. 707–21, is often useful. There are two American books, Keener, *Treatise on the Law of Quasi-Contract*, and Woodward, *Law of Quasi-Contract*, both of which deal to some extent with English case-law.

[2] Buckland, *Text-book of Roman Law*, 2nd ed., 537.

on contract, using the word "contract" in its common meaning of an enforceable agreement. A typical instance is the recovery of money paid by mistake; the recipient has committed no tort, and has not contracted (that is, he has not agreed) to repay, yet he is under a legal obligation to restore his unjust benefit. But there are good reasons why English quasi-contract cannot be defined in this way. Through historical development the same form of action, indebitatus assumpsit, was used to enforce claims of different juristic species; a contract in the sense of an agreement between two people, and the recovery of money paid by mistake, could both be enforced by this action, although clearly the obligation in the first case arises from agreement and in the second it is imposed by law irrespective of any real agreement. Hence we have contracts in the sense of agreements, and contracts in the sense of obligations imposed irrespective of agreements. The obligation to repay money paid by mistake arises from a contract that is implied by law. Most of English quasi-contract consists of contracts implied by law, and the practitioner is accustomed to deal with these matters under the headings of Implied Contract or Constructive Contract. In the last section of this book the nomenclature is discussed, and it is pointed out that the usual meaning of "contract" has come to connote agreement between the parties. It has come to be undesirable to treat Implied Contract as part of the Law of Contract, unless we are willing to lump together different types of obligation for the sake of a name or to display a leaning towards antiquarianism. But it is equally undesirable to define quasi-contract as, among other things, not resting on contract when most quasi-contracts are contracts historically, and can still be called contracts with technical correctness. Further, it is not possible to base all liability in English law on either tort or contract (here using contract in the widest sense); it is true that the old forms of action can be classed under this dichotomy, but even if such classification was still useful it would not be complete, for it would omit all reference to the jurisdiction of the Chancery Court. The conclusion appears to be that the scope of quasi-contract can only be determined as part of the determination of other heads of liability; such a vast labour is

clearly beyond the limits of this book. Professor Winfield has tackled this whole problem, seeking a definition not *in vacuo* but in relation to the whole field of obligations. For the purposes of this book I have adopted his definition, which is that quasi-contract signifies "liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit".[1]

Whatever definition of quasi-contract is adopted there is still the problem of deciding what types of case fall within this heading, and whether, even when a case is clearly within the heading, it is desirable to separate it from any other heading to which it has been customarily assigned. I hope to write before long a book on the modern law of quasi-contract, and it will then be necessary to deal with these points. For the purpose of a historical foundation it is enough to take the types of claim that are commonly assigned to quasi-contract; these types of claim do not cover the whole field, but they probably cover most of it, and are matters that will require considerable attention in any statement of modern law. Their history falls naturally into two periods, the division being the introduction of indebitatus assumpsit. I have accordingly divided this book into two Parts, making Part II (which contains the elements of modern law) as self-contained as is compatible with showing the continuity of development. The history of these types of claim has been carried down to the establishment of the main principles only; any subsequent refinements of a rule that are in the nature of exceptions and do not affect its general validity are not included. But there can be no clear dividing line between legal history and exposition of current law, and the attempted distinction is often merely an expression of the fact that a writer has to stop somewhere.

There is no detailed historical account of quasi-contract in English law. The subject has been dealt with in parts by Ames, Langdell, Street and Sir William Holdsworth; I have made full use of their writings, without accepting any of their conclusions

[1] Winfield, *Province of Tort*, 119.

except after an independent investigation.[1] It did not seem possible to build upon their work, so I adopted the method of a thorough search of all printed sources down to the rise of indebitatus assumpsit, taking the Year Books and the earlier reports page by page. The extracts made during this search gave a substantial "case-book", and the account of our earlier law was written from this material.[2] My conclusions generally confirm those of Ames on any topic that he covers, but I have been unable to accept many of Langdell's propositions. The relevant parts of Street, *Foundations of Liability*, are apparently based on Ames and Langdell, and Sir William Holdsworth refers the reader to Langdell for further details about the action of account. This explains why an apparently undue amount of my criticism of theories of account centres upon Langdell.

I have to thank Professor Winfield for the kindly interest he has taken in this book and for the helpful criticism that I have received from him, and the Cambridge University Press for the way in which they have carried out the work.

R. M. J.

Cambridge
March, 1936

[1] References are given to these authors throughout. The only writer I have relied on without checking his authorities is Barbour, *History of Contract in Early English Equity*; this was written from manuscript petitions, of which he made over 500 transcripts. The printed Chancery Calendar gives no indication of the principle upon which the cases were selected, and, whilst I have used this and the Selden Society collection, I have had to rely upon Barbour for many points.

[2] There is no dearth of authority. In Y.BB. there are over 170 "cases" of action of account before the death of Ed. III. Mr G. L. Williams has told me that in some De Banco Rolls he has searched, notably Mich. 9 Ric. II and Mich. 4 Hen. IV, the groundwork of the roll is made up of debt, detinue and account.

INDEX OF YEAR BOOKS

20 & 21 Ed. I, R.S. 366; 23
21 & 22 Ed. I, R.S. 456; 22
21 & 22 Ed. I, R.S. 598; 20
30 & 31 Ed. I, R.S. 238; 22
33 & 35 Ed. I, R.S. 238; 31
1 & 2 Ed. II, S.S. 40; 29
1 & 2 Ed. II, S.S. 107; 12
2 & 3 Ed. II, S.S. 34; 34
6 Ed. II, S.S. 156; 5
7 Ed. II, S.S. 104; 21
7 Ed. II, 228; 21
12 Ed. II, 351; 21
18 Ed. II, 598; 21
19 Ed. II, 656; 36
3 Ed. III, 10, pl. 30; 36
4 Ed. III, Fitz. Ab. Accompt, pl. 107; 12
12 & 13 Ed. III, R.S. 244; 11, 25, 30
12 & 13 Ed. III, R.S. 320; 12
13 & 14 Ed. III, R.S. 288; 21
16 Ed. III, R.S. ii, 26; 21, 33
16 Ed. III, R.S. ii, 384; 22
17 & 18 Ed. III, R.S. 512; 22
18 Ed. III, R.S. 22; 4
21 Ed. III, 10, pl. 30; 12
21 Ed. III, 30, pl. 13; 12
22 Ed. III, 11, pl. 8; 12
22 Ed. III, 16, pl. 56; 36
28 Ed. III, 22, pl. 28; 22
39 Ed. III, 9b; 29
41 Ed. III, 10, pl. 5; 31, 32, 35
41 Ed. III, 31, pl. 37; 25
42 Ed. III, 9, pl. 7; 22, 32
44 Ed. III, 20, pl. 16; 7
44 Ed. III, 21, pl. 23; 4
45 Ed. HI, 14, pl. 13; 27
49 Ed. III, 10, pl. 2; 12
12 Rich. II, A.F. 180; 28
13 Rich. II, A.F. 20; 27
2 Hen. IV, 12, pl. 50; 15, 25, 31
7 Hen. IV, 14, pl. 17; 27
11 Hen. IV, 64, pl. 19; 12
11 Hen. IV, 79, pl. 21; 22
12 Hen. IV, 18, pl. 16; 10
13 Hen. IV, 1, pl. 3; 22
1 Hen. V, 11, pl. 21; 26, 31
9 Hen. V, 14, pl. 23; 30
1 Hen. VI, 7, pl. 31; 22
2 Hen. VI, 9, pl. 5; 22
8 Hen. VI, 10, pl. 25; 28
10 Hen. VI, 7, pl. 21; 12
18 Hen. VI, 20, pl. 5; 24
19 Hen. VI, 5, pl. 10; 25
19 Hen. VI, 35, pl. 72; 25
20 Hen. VI, 16, pl. 2; 11, 13, 25, 28
20 Hen. VI, 34, pl. 4; 20
22 Hen. VI, 55, pl. 32; 10
33 Hen. VI, 2, pl. 10; 13
34 Hen. VI, 43, pl. 4; 27
36 Hen. VI, 9, pl. 5; 15, 31
37 Hen. VI, 9, pl. 18; 30
8 Ed. IV, 5, pl. 12; 25
9 Ed. IV, 40, pl. 22; 11
9 Ed. IV, 41, pl. 24; 6
9 Ed. IV, 45, pl. 32; 25
13 Ed. IV, 9, pl. 5; 8
18 Ed. IV, 23, pl. 5; 25
21 Ed. IV, 42, pl. 4; 25
22 Ed. IV, 5, pl. 15; 12
1 Ed. V, 2, pl. 2; 25
2 Rich. III, 14, pl. 39; 33
4 Hen. VII, 6, pl. 2; 12
10 Hen. VII, 6, pl. 12; 34
16 Hen. VII, 2, pl. 7; 8
20 Hen. VII, 9, pl. 18; 11, 25, 26
21 Hen. VII, 39, pl. 49; 8
12 Hen. VIII, 11, pl. 3; 4
27 Hen. VIII, 24, pl. 3; 30

INDEX OF CASES

Abbotts *v.* Barry, 75
Adamson *v.* Jarvis, 57
Alcinbrook *v.* Hall, 48
Allen *v.* Dundas, 63, 67
Ambrose *v.* Kerrison, 125
Andree *v.* Fletcher, 92
Andrew *v.* Boughey, 46
Andrew *v.* Robinson, 79
Andrews *v.* Hawley, 83
Anon (Comb. 341), 89
Anon (Comb. 447), 65, 72
Anon (1 Comyn Rep. 150), 63
Anon (Dal. 84, pl. 35), 42
Anon (Dyer 277b), 17
Anon (Godb. 13), 44
Appilgarth *v.* Serjeantson, 19
Arris *v.* Stukely, 62, 94
Ashby *v.* Ashby, 108
Asher *v.* Wallis, 64, 103
Asser *v.* Wilks, *see* Asher *v.* Wallis
Astley *v.* Reynolds, 65, 74, 89, 90
Atkins *v.* Banwell, 50
Att.-Gen. *v.* Durham, 55
Att.-Gen. *v.* Perry, 58, 66, 74
Aubert *v.* Walsh, 92
Ayre *v.* Sils, 108

Babington *v.* Lambert, 94
Bagg *v.* Slade, 56
Barber Surgeons of London *v.* Pelson, 45
Barbone *v.* Brent, 67
Barclay *v.* Gooch, 48
Barclay *v.* Pearson, 126
Bard *v.* Bard, 105
Barlow *v.* Browne, 100
Baron *v.* Husband, 100, 102
Bate *v.* Cartwright, 104
Bate *v.* Payne, 51
Bates *v.* Townley, 108
Battersey's Case, 91
Baylis *v.* Bishop of London, 126
Beckingham & Lambert *v.* Vaughan, *see* Babington *v.* Lambert
Bennett *v.* Francis, 73, 78
Bernales *v.* Fuller, 98, 99
Bilbie *v.* Lumley, 60, 61
Birch *v.* Wright, 75
Bishop *v.* Chambre, 108
Bize *v.* Dickason, 59
Bleaden *v.* Charles, 51, 52, 55
Bonnel *v.* Foulke, 58, 64
Booth *v.* Hodgson, 116
Bosanquet *v.* Dashwood, 89, 90
Bousfield *v.* Wilson, 115
Bowell *v.* Milbank, 63
Bowen *v.* Morris, 111
Bower *v.* Hett, 101
Boyter *v.* Dodsworth, 63
Bradshaw *v.* Beard, 125
Brand *v.* Lisley, 30
Brand & Herbert *v.* Boulcott, 57
Breckon *v.* Smith, 108
Bretton *v.* Barnet, 23
Brind *v.* Hampshire, 102
Brinsley *v.* Partridge, 44
Brisbane *v.* Dacres, 60, 61, 70
Brittain *v.* Lloyd, 51, 53, 54
Brown *v.* Hodgson, 51, 52
Brown *v.* London, 94
Brown *v.* M'Kinally, 68, 69, 70
Browning *v.* Morris, 90
Buller *v.* Harrison, 59, 114, 115
Burrough *v.* Skinner, 104
Busk *v.* Walsh, 92
Butcher *v.* Andrews, 47

Camillo Tank S.S. Co. Ltd. *v.* Alexandria Engineering Works, 108, 110
Canwey *v.* Aldwyn, 42
Cartwright *v.* Rowley, 65
Cary *v.* Webster, 114
Catlin *v.* Bell, 116
Cavendish *v.* Middleton, 9, 17, 58
Chandelor *v.* Lopus, 112
Chandler *v.* Webster, 86
Chatfield *v.* Paxton, 60
City of York *v.* Toun, 45, 120
Clark's Case, 31, 94
Clarke *v.* Dickson, 75, 84
Clarke *v.* Shee, 90, 91
Close *v.* Phipps, 66
Cobb *v.* Becke, 100, 101
Cobden *v.* Kendrick, 68, 69, 70
Cocking *v.* Ward, 107
Cole *v.* Saxby, 57

Colimore *v.* Jenson, 105
Collen *v.* Wright, 113
Collins *v.* Blantern, 90
Collins *v.* Prosser, 57
Coope *v.* Twynam, 56
Core's Case, 22, 23, 25, 31, 35
Cotterell *v.* Stratton, 125
Cotton *v.* Thurland, 104
Cowell *v.* Edwards, 57
Cowling *v.* Beachum, 103
Cragg *v.* Norfolk, 62
Craythorne *v.* Swinburne, 56, 57
Crifford *v.* Berry, 95
Crowfoot *v.* Gurney, 102

Dalby *v.* Cooke, 105
Dale *v.* Birch, 78
Dale *v.* Sollet, 117
Dalston *v.* Janson, 127
Dawson *v.* Linton, 51, 53
Decker *v.* Pope, 4
Deering *v.* Winchelsea, 56, 57, 125
Devonshire's (Earl of) Case, 13, 16
Dew *v.* Parsons, 66
Dewberry *v.* Chapman, 74, 85
Dimock's Case, 5
Dowson *v.* Scriven, 104
Drummond *v.* Deey, 91
Dunlop *v.* Selfridge, 97
Dunn *v.* Slee, 57
Dutch *v.* Warren, 85
Dutton *v.* Poole, 97

Earl *v.* Lubbock, 97
East India Co. *v.* Hensley, 111
Edmeads *v.* Newman, 75
Edmunds *v.* Wallingford, 51, 52, 55, 126
Edwards *v.* Burre, 40
Edwards *v.* Lowndes, 103
Egles *v.* Vale, 105
Ehrensperger *v.* Anderson, 79
England *v.* Marsden, 52
Exall *v.* Partridge, 50, 51, 52, 55

Falcke *v.* Scottish Imperial Insurance Co., 124
Farebrother *v.* Ansley, 57
Farmer *v.* Arundel, 59
Farmer *v.* Russell, 115
Farrow *v.* Mayes, 67
Feltham *v.* Terry, 67, 73
Fisher *v.* Fallows, 50
Fleet *v.* Perrins, 100
Fletcher *v.* Harcot, *see* Battersey's Case
Flureau *v.* Thornhill, 87
Foster *v.* Ley, 51
Foster *v.* Stewart, 77, 80, 126
Fouldes *v.* Willoughby, 75, 122
Fox *v.* Cutworth, 79
Framson *v.* Delamere, 6
Fruhling *v.* Schroeder, 101
Fulham *v.* Down, 65

Gibson *v.* Minet, 100
Gilbert *v.* Ruddeard, 93
Giles *v.* Edwards, 85
Gillan *v.* Simpkin, 86
Gingell *v.* Purkins, 79
Godfrey *v.* Saunders, 36
Gray *v.* Kirby, 100
Green *v.* Duckett, 71
Greenway *v.* Hurd, 66, 81
Griffin *v.* Weatherby, 102
Griffinhoofe *v.* Daubuz, 55
Grissell *v.* Robinson, 51
Grundy *v.* Townsend, 108
Gulliver *v.* Cosens, 71
Gurney *v.* Somes, 41

Hambly *v.* Trott, 73, 76, 81
Hamilton *v.* Spottiswode, 102
Hamlet *v.* Richardson, 70
Harbert's Case, 5
Hardoon *v.* Belilios, 124
Harington *v.* Macmorris, 79
Harris *v.* de Bervoir, 31, 35, 94, 97
Hart *v.* Langfitt, 47
Hart *v.* Longfield, *see* Hart *v.* Langfitt
Hasser *v.* Wallis, *see* Asher *v.* Wallis
Hastelow *v.* Jackson, 125
Hayes *v.* Warren, 49, 50
Hermann *v.* Charlesworth, 93
Hewer *v.* Bartholomew, 6, 58
Highmore *v.* Primrose, 107
Hill *v.* Perrott, 74
Hill *v.* Royds, 103
Hinson *v.* Burridge, 33
Hitchin *v.* Campbell, 73, 82
Hogan *v.* Shee, 74
Holme *v.* Lucas, 44
Holmes *v.* Hall, 43, 84, 87, 120
Homes *v.* Savill, 106
Howard *v.* Brownhill, 110
Howard *v.* Wood, 43, 62, 63, 72, 73, 76
Howell *v.* Batt, 100

Howlett *v.* Osbourn, 93, 94
Howson *v.* Hancock, 92, 104
Hunt *v.* Bate, 46
Hunter *v.* Hunt, 53
Hunter *v.* Northern Marine Insurance Co., 45
Hutton *v.* Eyre, 56

Irving *v.* Wilson, 66, 81
Israel *v.* Douglas, 95, 101

Jacob *v.* Allen, 63, 114
Jaques *v.* Golightly, 90
Jaques *v.* Withy, 90
Jefferys *v.* Gurr, 51
Jenkins *v.* Hutchinson, 113
Jenkins *v.* Tucker, 125
Jestons *v.* Brooke, 117
Johnson *v.* R.M.S.P. Co., 51
Jones *v.* Carter, 102
Jones *v.* Downham, 112, 113
Jordan *v.* Thomkins, *see* Jordan *v.* Tompkins
Jordan *v.* Tompkins, 47

Kaufman *v.* Gerson, 66
Kelly *v.* Solari, 126
Kennedy *v.* Broun, 108
Kent *v.* Derby, 47
Kitchen *v.* Campbell, *see* Hitchin *v.* Campbell
Knibbs *v.* Hall, 71
Knight *v.* Cambers, 54
Knowles *v.* Michel, 107
Kynaston *v.* Moore, 75, 122

Lacaussade *v.* White, 92
Lamine *v.* Dorrell, 44, 73
Lampleigh *v.* Brathwait, 46, 50
Langston *v.* Corney, 100
Laycock *v.* Pickles, 110
Leery *v.* Goodson, 78
Lewis *v.* Nicholson, 113
Lightly *v.* Clouston, 77, 80
Lilly *v.* Hays, 101, 102
Lincoln *v.* Topcliff, 23
Lindon *v.* Hooper, 71
Lingard *v.* Bromley, 57
Longchamp *v.* Kenny, 73, 77
Lowry *v.* Bourdieu, 59, 60, 61, 90, 91
Lubbock *v.* Tribe, 53, 108

M'Gregor *v.* Lowe, 116
M'Lachlan *v.* Evans, 79
Madden *v.* Kempster, 74
Malcolm *v.* Scott, 102
Manby *v.* Scott, 117
Marriott *v.* Hampton, 61, 66, 68, 69, 70, 118, 121
Marriott *v.* Lister, 48
Marsh *v.* Keating, 73
Martin *v.* Sitwell, 87
Maskell *v.* Horner, 72
Maxwell *v.* Jameson, 48
Mayor of London *v.* Gorry, 41, 43, 45, 127
Mayor of London *v.* Hunt, 45
Mead *v.* Death, 67
Merryweather *v.* Nixan, 57
Middleditch *v.* Ellis, 108
Milnes *v.* Duncan, 70
Milward *v.* Ingram, 105
Mollett *v.* Robinson, 54
Montagu *v.* Forwood, 101
Moody *v.* Spencer, 101
Moore *v.* Bushell, 100
Moore *v.* Pyrke, 48
Morgan *v.* Palmer, 65, 81
Morgan *v.* Seymour, 56
Morrell *v.* Wootten, 100
Mortimer *v.* Gell, 54
Moses *v.* Macferlan, 67, 68, 69, 85, 117, 118, 121
Mountague *v.* Preston, 62

Neate *v.* Harding, 76, 78
Neville *v.* Wilkinson, 89, 92
Newbigging *v.* Adam, 84
Newdigate *v.* Davy, 64, 67
New Zealand Land Co. *v.* Ruston, 100
Nicholson *v.* Gooch, 115, 116
Nightingal *v.* Devisme, 77
Norris *v.* Napper, 77
North's (Lord) Case, 41

Oates *v.* Hudson, 115
Osborne *v.* Williams, 91
Oughton *v.* Seppings, 76
Owen *v.* Cronk, 66

Paramour *v.* Yardley, 17
Parker *v.* Bristol &c. Ry. Co., 66, 115
Parker *v.* G.W.R., 66
Parrott *v.* Wells, 111
Parry *v.* Roberts, 26
Parsons *v.* Blandy, 66, 81
Paschall *v.* Keterich, 31

Pasley *v.* Freeman, 74
Patman *v.* Harland, 129
Paynter *v.* Williams, 50
Peter *v.* Rich, 56
Philips *v.* Biggs, 57
Phillips *v.* Hunter, 68
Phillips *v.* Thompson, 72
Pickard *v.* Bankes, 79
Pickard *v.* Bonner, 89
Pinto *v.* Santos, 100
Polhill *v.* Walter, 111, 112, 113
Pond *v.* Underwood, 114
Powell *v.* Rees, 75, 77, 81
Power *v.* Butcher, 48, 49
Pownal *v.* Ferrand, 51, 55

Raffles *v.* Wichelhaus, 87
Rains *v.* Commissary of Canterbury, 63
Read *v.* Brown, 111
Reade *v.* Johnson, 108
Reed *v.* James, 78
Rex *v.* Addington, 111
Reynell *v.* Sprye, 91
Rhodes, in re, 119, 120
Rice *v.* Reed, 83
Robbins *v.* Fennell, 103
Robertson *v.* Fauntleroy, 100
Robsert *v.* Andrews, 17, 31, 36
Rodgers *v.* Maw, 48, 76
Rogers *v.* Kelly, 99
Rogers *v.* Price, 125
Rolte *v.* Sharp, 42
Rozer *v.* Rozer, 47
Rustomjee *v.* The Queen, 102

Sadler *v.* Evans, 114, 117
Scadding *v.* Eyles, 108
Scott *v.* Porcher, 100
Seago *v.* Deane, 107
Shandois *v.* Simson, 30
Shaw *v.* Norwood, 31
Shrewsbury's (Earl of) Case, 62
Shuttleworth *v.* Garnet, 41, 43, 45
Sills *v.* Laing, 52
Sinclair *v.* Brougham, 118, 119, 120, 123
Slade's Case, 40, 42, 44
Sleigh *v.* Sleigh, 52
Smith *v.* Baker, 82, 83
Smith *v.* Bickmore, 104
Smith *v.* Bromley, 89, 90, 120
Smith *v.* Hodson, 73, 81, 83
Smout *v.* Ilbery, 112, 113
Snowdon *v.* Davis, 72, 114, 115
Société des Hôtels Réunis *v.* Hawker 66
Speake *v.* Richards, 94, 127
Spencer *v.* Parry, 53, 54
Spratt *v.* Hobhouse, 79, 80
Stamton *v.* Suliard, 40
Standish *v.* Ross, 78
Stanton *v.* Suliard, *see* Stamton *v.* Suliard
Starke *v.* Cheeseman, 120
Starkey *v.* Mylne, 31
Steele *v.* Williams, 115
Stephens *v.* Badcock, 100, 102
Stevens *v.* Hill, 96, 99
Stevenson *v.* Hardie, 48
Stevenson *v.* Mortimer, 114
Stevenson *v.* Snow, 87
Stewart *v.* Casey, 47
Stewart *v.* Fry, 100
Stokes *v.* Lewis, 51
Stokes *v.* Twitchen, 91
Stonehouse *v.* Bodvil, 47
Strongitharm *v.* Lukyn, 91
Stuart *v.* Wilkins, 112
Suliard *v.* Stamp, *see* Stamton *v.* Suliard
Swain *v.* Morland, 78

Tappenden *v.* Randell, 92
Tatlock *v.* Harris, 96
Taylor *v.* Bowers, 126
Taylor *v.* Hare, 85
Taylor *v.* Higgins, 48
Temple *v.* Welds, 103
Tenant *v.* Elliott, 115, 116
Thomas *v.* Hewes, 113
Thomas *v.* Thomas, 18
Thomas *v.* Whip, 73, 75
Thompson *v.* Spencer, 77
Thurston *v.* Mills, 78
Tomkins *v.* Bernet, 9, 43, 58, 74, 88, 89, 90, 120
Tottenham *v.* Bedingfield, 13, 14, 17
Towers *v.* Barrett, 85
Tugwell *v.* Heyman, 125
Turner *v.* Davies, 57

Umphelby *v.* M'Lean, 66, 81

Vandyck *v.* Hewitt, 92

Wakefield *v.* Newbon, 66
Walker *v.* Chapman, 89, 92

Walker *v.* Rostron, 102
Wallace *v.* Smith, 81
Walton *v.* Hanbury, 57
Warbrook *v.* Griffin, 42
Ward *v.* Evans, 95
Waterhouse *v.* Keen, 81
Watson *v.* Turner, 50
Wedlake *v.* Hurley, 100
Wharton *v.* Walker, 102
Whorwood *v.* Gybbons, 44, 105
Wilkin *v.* Wilkin, 13
Wilkinson *v.* Kitchin, 89
Williams *v.* Everett, 96, 97, 99, 100, 102, 103
Williams *v.* Hedley, 91
Wilson *v.* Coupland, 79
Wilson *v.* Milner, 57
Wilson *v.* Poulter, 83
Winterbottom *v.* Wright, 97
Woodward *v.* Aston, 62, 73
Wormleighton *v.* Hunter, 5
Wright *v.* Hunter, 57

Yates *v.* Bell, 103
Yonge *v.* Toynbee, 113
Young *v.* Ashburnham, 42
Young *v.* Marshall, 78

INDEX OF STATUTES

Stat. of Marlbridge, 1267 (52 Hen. III, c. 4); 71
Stat. of Frauds, 1677 (29 Ch. II, c. 3); 47, 107
(Liability of executors), 1705 (4 & 5 Anne c. 16); 18, 21
Tithe Commutation Act, 1836 (6 & 7 W. IV, c. 71); 55
Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76); 81, 82, 83
Sale of Goods Act, 1893 (56 & 57 Vict., c. 71); 87, 119
Marine Insurance Act, 1906 (6 Ed. VII, c. 41); 87
Law of Distress Amendment Act, 1908 (8 Ed. VII, c. 53); 6
Trustee Act, 1925 (15 Geo. V, c. 19); 124
Third Parties (Rights against Insurers) Act, 1930 (20 & 21 Geo. V, c. 25); 127
Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. V, c. 41); 76
Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. V, c. 30); 57

LIST OF MODERN AUTHORITIES

REFERRED TO BY ABBREVIATED TITLES

Ames Found.: In Year Book references, the Publications of The Ames Foundation.

Ames, *Lectures*: J. B. Ames, *Lectures on Legal History and Miscellaneous Legal Essays*, 1913. (The Lectures were delivered between 1886 and 1895.)

Barbour, *History of Contract in Early English Equity*: Published in *Oxford Studies in Social and Legal History*, vol. IV, 1914.

Bullen and Leake: *Precedents of Pleadings*, references are to 3rd ed. 1867 or 8th ed. 1924, as specified in the footnotes.

Camb. L.J.: *Cambridge Law Journal*.

H.E.L.: Sir William Holdsworth, *A History of English Law*, 3rd ed. 1922–6.

H.L.R.: *Harvard Law Review*.

Holmes, *Common Law*: O. W. Holmes, *The Common Law*, 1881.

P. and M.: Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the time of Edward I*, 2nd ed. 1898.

R.S.: In Year Book references, *The Rolls Series*.

Salmond, *Torts*: Sir John Salmond, *The Law of Torts*, 8th ed. 1934.

Salmond and Winfield, *Contract*: Sir John Salmond and P. H. Winfield, *Principles of the Law of Contract*, 1927.

Smith L.C.: J. W. Smith, *A Selection of Leading Cases on Various Branches of the Law*, 13th ed. 1929.

S.S.: Publications of The Selden Society.

Street: T. A. Street, *The Foundations of Legal Liability*, 1906.

Winfield, *Province of Tort*: P. H. Winfield, *The Province of the Law of Tort*, 1931.

Part I

BEFORE THE RISE OF INDEBITATUS ASSUMPSIT IN THE SEVENTEENTH CENTURY

SECTION 1

General

THERE has been more continuity in our law of quasi-contract than is apparent at first sight; there is no possible course in this history except to begin with medieval law. The history of quasi-contract is in some respects like the history of negligence; long and short threads must be caught up to form a principle. Negligence is ahead of quasi-contract.

It is a commonplace that remedies, chiefly the forms of action, have moulded our law. For centuries lawyers have been accustomed to consider not general theories but forms of remedies. Hence if we were to examine early law from the point of view of the contemporary lawyer we should have to group our law round remedies, and produce a new edition of Fitzherbert's *Natura Brevium*, copiously supplied with historical notes. The course followed here is to group medieval cases under modern headings.[1] This has several disadvantages. It means that no coherent account can be given of the various actions, but that is not serious, since any specialised legal history must presuppose a working knowledge of the old forms of action. A more important point is the desirability of discussing whether a medieval remedy was contractual or quasi-contractual when at the time there was no such distinction, the very word "contract" bearing a meaning unfamiliar to modern lawyers. But there is really no choice. It is not only customary but also proper to place the case of the Humber ferryman who drowned cattle near the beginning of the history of simple contract, though no contemporary lawyer would have seen any connection with "contract". In the same way many of the matters dealt with in the succeeding sections would have appeared to a medieval lawyer to have been torn from their natural setting. It is only when these somewhat disconnected topics have been discussed in the light of more modern classifications that it is possible to see the course of development.

[1] I have made use of Jenks, *Digest*, ss. 707–21, in settling these headings.

SECTION 2

Rights of indemnity or contribution where the plaintiff has been compelled to pay another's debt, or discharge another's liability

Such rights may well arise from contract, but in many cases there is no contract, and they must be treated as quasi-contractual. As the rules developed largely in early equity, no distinction was made between cases where there were promises and where the liability arose from the "equities" of the position. The most important matters falling under this heading are those concerned with suretyship. When a surety has been called upon to pay, he may want indemnity from the principal debtor, or contribution from co-sureties.

First, the right to indemnity. We do not find any medieval common law rules, since parol suretyship, whatever its early history may have been, was not enforceable from the time of Edward III[1] until action of assumpsit was allowed in 1520.[2] Claims for indemnity were known in the fair courts[3] but these courts declined in importance. Suretyship, as a common law matter, was covered by the rules of the action of covenant; if a surety took the precaution to make the principal debtor covenant to indemnify him, then he would have a remedy, whilst if there was no such clause he must go to the chancellor. Such cases formed a regular part of the chancellor's jurisdiction during the fifteenth century.[4] There was no remedy at common law until 1757.[5]

Second, the right to contribution. There was probably no means of making a co-surety contribute unless he had covenanted to do so. There is one early case where one of three debtors who has been condemned to pay asks the court for the deed so that

[1] H.E.L. III, 424, citing Y.BB. 18 Ed. III, R.S. 22; 44 Ed. III, 21, pl. 23. Holmes, *Common Law*, 264, to same effect, citing 44 Ed. III, 21, pl. 23. The cases are not so clear as to be conclusive, but there is no case where parol suretyship was enforced until 1520.

[2] Y.B. 12 Hen. VIII, 11, pl. 3. Ames, *Lectures*, 142.

[3] *Cases on Law Merchant*, Selden Society, vol. i, p. 6.

[4] Barbour, *History of Contract in Early English Equity*, 135–7.

[5] *Decker* v. *Pope*, Selwyn's *Nisi Prius*, 13th ed. 1, 91, cited Ames, *Lectures*, 155.

he can sue the others, but his claim may well have been on some clause in the deed.[1] As in the case of indemnity, a remedy had to be sought from the chancellor.[2] In 1614 a remedy was sought in the Court of Requests, but the Court of Common Pleas issued Prohibition, as such actions "would be a great cause of suits".[3] In 1609 it was said "that a collector of a fifteenth may levie all the tax within one township, upon the goods of one inhabitant only if he will, and that inhabitant shall have aid of the court [Court of Exchequer] to make each other inhabitant to be contributory, which was granted by the court".[4]

The limited right of contribution among joint tortfeasors does not appear to have any medieval roots.

Land law provides several cases. For example, "If a man be seised of three acres of land, and acknowledges a recognizance... and enfeoffs *A* of one acre, *B* of another, and the third descends to his heir; in this case if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir sits in the seat of his ancestor....If a man be bound in a recognizance, and hath issue two daughters, and dies, they make partition; one alone shall not be charged, but shall have contribution...."[5] It is not necessary to follow this topic further, as such claims to contribution will be found to be matters better treated as part of land law or specific duties of an heir. Other obligations to contribute or compensate arise from tenure, but they are only of antiquarian interest.[6] The most important was writ of mesne.[7] If a mesne lord failed to render his services to his lord paramount, the lord paramount

[1] Y.B. 6 Ed. II, S.S. 156.

[2] *General Abridgment of Cases in Equity*, p. 114, pl. 9 and 10, and cases there cited. I have made no attempt to state the chancellor's jurisdiction with precision; Equity did not become in substance a body of rules until the later seventeenth century, when the use of precedents became usual in chancery; H.E.L. VI, 668; Sir Frederick Pollock, *The Transformation of Equity*, published in *Essays in Legal History*, 1913.

[3] *Wormleighton* v. *Hunter*, Godb. 243. The development of a common law remedy is discussed in sect. 20 below.

[4] Tanfield, C.B., in *Dimock's Case*, Lane at p. 65.

[5] *Harbert's Case*, (1584) 3 Co. Rep. 11, at 12 b, where many similar circumstances are discussed.

[6] See Viner's Abridgment, Title *Contribution*.

[7] F.N.B. 135, Co. Litt. 100 a.

could distrain and take the chattels of any tenant. The tenant could proceed against his mesne lord by a writ of mesne. The value of this remedy obviously depends on the solvency of the mesne lord, and a tenant is better protected by such limitation of the right to distrain as is made by the Law of Distress Amendment Act, 1908.

SECTION 3

Recovery of money paid by mistake

Bracton included *condictio indebiti* among obligations *quasi ex contractu*,[1] but it is notorious that this part of his work had least connection with, or influence on, English law. If the money was paid by mistake, detinue could never lie because the title would pass. The possible actions seem to be debt or account. There are no early cases where these actions were used. The first case where a remedy in account was given appears to be *Framson* v. *Delamere* (1595).[2] There had been an action between Adderley and *B*, and *X* had gone bail for *B*. Adderley obtained judgment against *B*, and *X* was called upon to pay and did so. It then appeared that he need not have paid, since Adderley's name was spelt "Adderbye" in the judgment, and *X* was only bound to pay Adderley. *X* had action of account against Adderley to recover the sum he had paid him. If *X* paid under protest, then the case was one of extortion of money by threats of legal process. In *Hewer* v. *Bartholomew* (1598)[3] action of account was allowed for money paid by mistake, although the report is not clear whether there was mutual mistake or mistake by the plaintiff induced by the fraud of the defendant.

There is one early case in which a plaintiff was possibly trying to use trespass to recover money paid by mistake.[4] The claim was trespass for carrying off a bag of money to which the defendant replied that the plaintiff owed the defendant money, and had given him the bag in settlement. The plaintiff then wished to plead that there was never any such debt, a course only consistent with an admission that he handed over the bag

[1] f. 100 b.
[2] Cro. Eliz. 614.
[3] Cro. Eliz. 458.
[4] Y.B. 9 Ed. IV, 41, pl. 24.

presumably because he thought he was indebted. The case illustrates the difficulty of distinguishing between a general traverse in which the defendant pleads some evidence, and a special traverse; Moile thought the plaintiff's replication could be *de son tort demesne*, but Littleton's view to the contrary seems correct, as you cannot confess and avoid after a plea amounting to the general issue. If this is a case of an attempt to recover money paid by mistake, it is difficult to see how it could ever succeed in this form of action.

I do not know of any case where the chancellor was asked to give a remedy, except where the plaintiff's mistake was due to fraud in the defendant, which requires separate treatment.

The conclusion is that prior to the close of the sixteenth century our law allowed the fortunate recipient to keep such money.

SECTION 4

Money obtained from the plaintiff by extortion or fraud

A plaintiff may have paid money to recover his goods wrongfully detained, or to escape some other form of oppression to himself or his property, or through the fraud of the defendant. At the present day it is perhaps necessary to distinguish between the first case and the others, on the ground that the first is redressable by simple action for money had and received, whilst the latter are cases of waiver of tort.[1] For earlier law there is no need to make any such nice distinction. At common law the remedies were trespass, detinue, replevin and action on the case. Except in the case of fraud the common law remedies seem adequate in theory. Replevin, particularly when it could be used for some cases of trespass,[2] was a convenient remedy; the delay of detinue was avoided, and it is always better to have the goods instead of a right of action, for a favourable judgment does not always end a plaintiff's troubles. These actions are in tort, and it is not necessary to discuss their scope. Only one case seems worth discussion;[3] trespass *vi et armis* was brought

[1] Thus Jenks, *Digest*, s. 713 (viii) is distinguishable from 713 (ii) and (ix), these two latter falling under the same head. Winfield, *Province of Tort*, 168, 173, to same effect.

[2] Ames, *Lectures*, 69.

[3] Y.B. 44 Ed. III, 20, pl. 16.

against a miller who took toll from one for whom he should mill toll-free. It was objected that there was no tort *vi et armis*, but the writ was thought good as the case went to trial. Whether the plaintiff paid because he could not otherwise get his flour, or whether he paid before it was ground, does not appear. If the miller is to be regarded as failing to exercise his calling the action should have been on the case. I know of no other similar decision.

The distressing tales of oppression found in bills in Eyre and later in petitions to the chancellor show that what was wrong was not so much the rules of common law as the difficulty of its administration. In a few cases common law might not have given a satisfactory remedy, as in a bill before the Shropshire Eyre in 20 Edward I.[1] *T* wanted 20*s*. and a Jew agreed to lend him 20*s*. for a period for 30*s*., on the guarantee of *D*. The Jew paid only 7*s*. to *T*, but *D* took possession of *T*'s house in lieu of a gage. *D* then settled with the Jew by paying him 15*s*., and when *T* offered *D* that sum in discharge *D* refused to take less than 24*s*., so *T* "pur ceo ne voleit la mesun perdre" procured 24*s*. and paid it to *D*, and then never got his house. No result is stated in the report. In other cases there is no doubt about the theoretical adequacy of the common law, as where the petitioner was forced to agree to pay 100 marks, the defendants "said expressly that they would cut off his head if he would not"; they then gave him back his deed, and took away sheep instead, and still have the sheep; relief is sought because defendants are strong in the country. A writ was granted.[2] The petitioner who in 1388 says he has been wrongfully imprisoned "and there has dwelt and still dwelleth and will dwell until the said £36 is paid, if he have not God's aid or yours" may well have been telling the truth.[3]

In the case of fraud there are many difficulties. If the goods came to the possession of the defendant by consent of the plaintiff, or of plaintiff's bailee, trespass would not lie.[4] Detinue

[1] *Select Bills in Eyre*, S.S., vol. xxx, no. 27.

[2] *Chancery Cases*, S.S., vol. x, no. 31, date after 1397.

[3] *Chancery Cases*, S.S., no. 8. Other cases of relief for extortion are: *Select Bills in Eyre*, S.S., nos. 65, 98 and 120. *Chancery Cases*, S.S., nos. 10 and 134; 1 Chanc. Cal. 44.

[4] Y.BB. 13 Ed. IV, 9, pl. 5; 16 Hen. VII, 2, pl. 7; 21 Hen. VII, 39, pl. 49.

would not lie because title passed; it was not until the later eighteenth century that fraud inducing a contract could be redressed by action on the contract.[1] The usual common-law procedure was to sue in tort, by an action on the case;[2] by the end of the seventeenth century indebitatus assumpsit could be used.[3] Common law actions for fraud were not always satisfactory, and relief was often sought in the chancery court.[4] The petitioner usually asks for a remedy generally. Where restitution is sought the cases are indistinguishable from those quoted under the heading of consideration which has wholly failed.[5]

The only unexplored problem is whether medieval law knew any process akin to waiver of a tort. Did common law allow a plaintiff to sue a usurper of an office or a wrongful receiver of another's rents by action of account? The answer to this question is important, for it may throw light on the mysterious "privity" which haunts some later cases, yet its early history has not received much attention.[6]

Many of the difficulties arise because account has some peculiarities. The action is brought to compel the defendant to render an account, and the only question to be decided *in this action* is whether he must do so; if judgment is given against the defendant, then auditors will be appointed to take accounts, and on their finding debt will be brought if the sum found due is not paid, the allowances and disallowances of the auditors being tested in that action of debt. Throughout the history of account

[1] H.E.L. VIII, 67–70.

[2] In *Cavendish* v. *Middleton*, (1628) Cro. Car. 141, W. Jo. 196, the action was to recover money obtained from the plaintiff by fraud, and the report describes it as an "action on the case". I have inspected the Record (K.B. 27/1526.243) and it appears that it was Trespass on the case. I am not in a position to discuss the factors which determined when Trespass on the case and when Deceit on the case was the proper remedy. Presumably the distinction was immaterial, since the reports use the phrase "action on the case" with no further explanation of the precise form of writ.

[3] E.g. *Tomkins* v. *Bernet*, (1693) Salk. 22.

[4] *Chancery Cases*, S.S., nos. 2, 99, 119; 1 Chanc. Cal. 20; 2 Chanc. Cal. 37.

[5] Sect. 6 below.

[6] Ames, *Lectures*, 120, gives it a few lines, with less than his usual wealth of authority. Langdell, H.L.R. II, 248, is fuller, but I think he missed many points; his references are to abridgments only. Street, III, 99 seq. is mainly founded on Langdell. H.E.L. III, 426 refers to Langdell for further information on action of account. For the later period see Winfield, *Province of Tort*, 134–8, 161–2, and sect. 30 below.

it was said that the action lay only against guardians in socage, bailiffs, or receivers. That was a formal rule, without exceptions, being really a pleading rule; a defendant must be sued in one of the three categories, and the plaintiff must show that the defendant is within the category alleged. A large number of the Year Book cases of account deal with the distinction between a bailiff and a receiver; this distinction does not affect the principles of the action, but was of great practical importance because a bailiff was allowed his expenses and a receiver was not. The plaintiff could make out his case by showing, either (1) that the defendant really was guardian in socage, or bailiff, or a receiver to render account; or (2) that although the defendant was not such a person in fact, he was by operation of law to be treated as such. In other words we have "actual" and "constructive" bailiffs etc. This distinction is clearly shown by Fitzherbert:[1]

"A writ of account lieth divers ways; for if a man make one his bailiff of his manor, etc., he shall have writ of account against him as bailiff. And if a man make one his receiver, to receive his rents or debts etc., he shall have writ of account against him as receiver.... A man shall have a writ of account against one as bailiff or receiver, where he was not his bailiff or receiver...." Fitzherbert here gives some of the cases discussed below.

A defendant has only two substantive defences: (1) he can say that he never was bailiff etc., that is, plead the general issue; or (2) plead that he is no longer accountable because the obligation to account has been terminated. For instance, a plea that the defendant, who was plaintiff's receiver, had delivered money to a stranger by order of the plaintiff is not a plea in bar, for the defendant is accountable and his payment is merely an item of his accounts;[2] but a discharge by deed is a good plea in bar as that novates the obligation.[3]

It is commonly said that action of account did not lie against a wrongdoer.[4] This requires qualification. If a person is an "actual" bailiff etc., then he is liable to account (unless he has

[1] F.N.B. 116, 117.
[2] Y.B. 12 Hen. IV, 18, pl. 16. [3] Y.B. 22 Hen. VI, 55, pl. 32.
[4] Co. Litt. f. 172 a, "against a disseisor or other wrongdoer no account doth lie". Ames, *Lectures*, 120, "An action of account could never lie against a tortfeasor, with the exception that the King could have such an action."

a plea in bar under the second head of defence given above), and the reason why he has not fulfilled his duty is irrelevant. He may have lost the money through robbery, which will be an excuse before the auditors, but is no defence in action of account.[1] A receiver of money to render account may have committed what we now call "fraudulent conversion", and he would be ordered to account.[2]

This can be summed up by saying that when a person had already become accountable his *subsequent* misappropriation of money would be redressable by action of account as the first step.

"Constructive" guardians, bailiffs, and receivers fall into two classes: (1) those who did receive to render account but whose agreement to do so was not with the plaintiff; where *A* gives money to *B* for the benefit of *C*, *B* is "actual" receiver in respect of *A*, and "constructive" receiver as regards *C*. These cases are discussed in sect. 14 below. (2) When a person not already accountable becomes accountable by doing some act of interference with the plaintiff's property, the act being authorised neither by law nor by the plaintiff. Only a few acts of interference have been held to make a defendant accountable, and the only common factor to be found in these cases is that the act never amounted to a disseisin or its equivalent in the case of goods. That is a negative characteristic, but it may

[1] Y.B. 9 Ed. IV, 40, pl. 22.

[2] Y.B. 20 Hen. VII, 9, pl. 18, dictum of Frowyk, C.J.: "Car si jeo baile deniers a bail' oultr̄, & il convert̄ eux a son oeps dēm, jeo puis av̄ acc̄ de Accompt, Det̄, ou Acc̄ sur le cas." That the point of the action was to determine liability to account, and not liability for particular items, is shown by the pleading where the plaintiff alleges liability to account as bailiff etc. and failure to do so, and nothing else; see Coke, *Booke of Entries*, f. 46 and 47. Compare Y.B. 20 Hen. VI, 16, pl. 2. Plaintiff leased an inn to defendant, with bedding and other things, and some of the bedding was missing and some rent due. Compensation for the missing bedding and payment of arrears of rent cannot be obtained by account. Brown argued that account lies for misappropriation by a bailee, but Newton, C.J., held otherwise: "If one bails a thing to me to bail to another, and peradventure I waste it in my hands, shall he have account against me? Q.d. quod non, but a writ of detinue." For such non-delivery of chattels detinue had long been the proper action, Y.B. 12 and 13 Ed. III, R.S. 244. The point, not explained by Newton, C.J., is that account did not lie for anything but money; account of the proceeds would have lain well enough if defendant had received chattels ad merchandisandum.

possibly explain all the rules. "Accountable interferences" were:

(i) If a stranger occupies land of an infant as guardian in socage when he is not, he must account as if he were true guardian in socage.[1]

(ii) If a defendant occupied as guardian in chivalry when the land was really held in socage, he must account as a guardian in socage.[2]

In both cases it was only necessary to show that the defendant held *as guardian*, so that in neither case would the wrongful occupier be a disseisor, since a guardian was not seised of the infant's land.[3] The first case can be explained on the grounds of estoppel, but that is inapplicable to the second case, where the defendant has taken the profits for his own use without the slightest intention of ever accounting. This caused Brooke some difficulty.[4]

(iii) If a stranger entered on land held by a rightful guardian in chivalry and levied money from the land, there is some authority for saying that the guardian has account as alternative to ejectione custodiae.[5] The only possible disseisin would be disseisin of wardship and not of the land, but the guardian could in the time of Brooke elect whether an interference with his incorporeal property was a disseisin or not, by analogy with the owner of a rent service.

(iv) It was said that if a tenant by elegit cut down great trees he was liable to account.[6] A tenant by elegit has only a chattel interest, the seisin being in the debtor.[7]

(v) If a defendant receives the plaintiff's rents without the plaintiff's consent, according to Brian, C.J., he is liable to account.[8] Brooke adds that the rent must be received to the

[1] Y.BB. 1 and 2 Ed. II, S.S. 107; 4 Ed. III, Iter of Derby, Fitz. Ab. Accompt, pl. 107; 12 and 13 Ed. III, R.S. 320; Statham, Accompt, pl. 23 (Trin. 13 Ed. III), speaks of the occupation here as "come prochn amy de s' tort demesne"; 22 Ed. III, 11, pl. 8; Littleton, *Tenures*, s. 124.

[2] Y.BB. 21 Ed. III, 10, pl. 30; 49 Ed. III, 10, pl. 2; 10 Hen. VI, 7, pl. 21; 22 Ed. IV, 5, pl. 15.

[3] P. and M. 11, 37.

[4] Br. Ab. Accompt, pl. 22, and see p. 14 below.

[5] Y.B. 11 Hen. IV, 64, pl. 19.

[6] Y.B. 21 Ed. III, 30, pl. 13.

[7] Co. Litt. 43 *b*.

[8] Y.B. 4 Hen. VII, 6, pl. 2.

plaintiff's use.[1] Manwood, C.B., in *Tottenham* v. *Bedingfield* (1572)[2] restates the rule as Brian, C.J., stated it. Manwood, C.B., gives what is undoubtedly the key to apparent conflict of authorities; he explains that account for profits would not lie against one who had disseised the plaintiff of his land, but that it would lie against one who merely collected rents from tenants of the plaintiff, because no wrong has been done to the plaintiff, who can claim the rents from his tenants (who of course would not be discharged by payments made to the wrong person), or bring writ of account. At first sight Fitzherbert seems to support Brooke's gloss: "And so if a man enter into my land to my use, and receive the profits thereof, I shall have account against him as bailiff."[3] But entering on land and taking the profits is not synonymous with merely collecting rents. In the case of rents there is no disseisin unless the plaintiff so elects,[4] whereas in the case of a general entry and receipt of profits the question to whose use they are taken will determine whether there has been an adverse claim of dominium, that is whether there is a disseisin. So that when Brooke says that where a man takes upon himself to be my bailiff I can have account, but not where he enters to his own use,[5] I agree that the "use" is the determining factor. But for the mere collection of a rent I think that Brian, C.J., and Manwood, C.B., stated the true rule.

(vi) A bailee who misappropriates the property bailed cannot be sued in account.[6] The close parallel between disseisin of land and wrongful appropriation of goods has been shown by Ames.[7]

[1] Br. Ab. Accompt, pl. 65.
[2] 3 Leon. 24, Owen 35.
[3] F.N.B. f. 117 a.
[4] Littleton, *Tenures*, ss. 588, 589.
[5] Br. Ab. Accompt, pl. 8, abridging 33 Hen. VI, 2, pl. 10, where Prisot maintained that account lies for a general tortious occupation of a manor, i.e. against a disseisor. It was never doubted that the king can charge a wrongdoer in account (repeated in *Earl of Devonshire's Case*, (1606) 11 Co. Rep. 89); Prisot sought to extend that principle to all cases. In *Wilkin* v. *Wilkin*, (1690) Salk. 9, 1 Show. 71, Holt, C.J., said that "where ever one acts as bailiff he promises to render account", showing an extension of remedies.
[6] Y.B. 20 Hen. VI, 16, pl. 2. Brown argued that if he and his bon compagnons drank up a tun of wine bailed, account would be the right action. Newton, C.J., was emphatic that detinue was the right action. See p. 11, note 2 above.
[7] *Lectures*, pp. 172 seq.

For the negative rule that account will not lie against disseisors there was a good reason, of which Brooke gives us an instance:[1] "car donq le disseisie avoydra discēts p son plesure". It is not too much to say that the whole basis of our law of property rests on the rights of the man seised; a disseisee could not leave a disseisor in seisin and make his occupation valueless by bringing account. When a reason is as fundamental as this one does not expect to find much, or even any, direct authority for it.

In the search for a positive rule we can consider Ames' suggestion that in account for the collection of plaintiff's rents "the court proceeded on a vague notion of ratification of the defendant's action".[2] Support for this proposition can be found in *Tottenham* v. *Bedingfield* (1572),[3] and it may be correct for later law. I do not think that it is an explanation which would have been understood at an earlier date. Barbour, after pointing out that in the Year Books there is nothing of ratification (a statement with which I agree), and that the scanty common law doctrines of agency generally led to a wider recognition in chancery, found only one chancery case of ratification.[4]

This suggests a more careful examination of Brooke. Statham and Fitzherbert merely epitomised these particular Year Book cases but Brooke in a series of glosses states general rules, even on occasion giving something in the nature of a reason.

(i) Persons who cannot be sued in account, according to Brooke, are: Disseisors,[5] one who enters land to his own use,[6] possessor through a tort,[7] trespasser (the context showing that adverse occupation of land is meant).[8] The taker of a rent to plaintiff's use must account,[9] but the taker of a rent by disseisin is queried, since the case he is abridging (defendant holding as guardian in chivalry when land is in socage) shows that account "est admit de giser vers occupier de tre sans privitie";[10] his references here to other pleas show that he did not think a taker of rents by disseisin was accountable.

[1] Br. Ab. Accompt, pl. 89, abridging an unreported case of 2 Mary.
[2] Ames, *Lectures*, 120. [3] 3 Leon. 24, Owen 35.
[4] Barbour, *History of Contract in Early English Equity*, 130–2.
[5] Br. Ab. Accompt, pl. 24 and 89. [6] *Ibid.* pl. 8 and 89.
[7] *Ibid.* pl. 24 and 65. [8] *Ibid.* pl. 93. [9] *Ibid.* pl. 65.
[10] *Ibid.* pl. 22.

(ii) In so far as Brooke gives reasons, Accompt, pl. 89[1] contains all of them: Marginal note, "Vers disseisor" 2 Mary 1: "Accõpt ne gist vers disseisors, car donq le disseisie avoydra discẽts p son plesure, & auxi le def. ne fuit unq son resceuor pur accõpt rend, car ceo ne poet este sans priuitie in ley ou in fait, cõe p assignemt, ou come gardẽ, ou huiusmodi, ou per pretence le def. al use le pl' & non ou le def. claim̃ a son use demene, car la le ple est voyr, ne unq son receuor ou baylie pur accompt etc."

To say that the action does not lie because the defendant never received to render account sounds too obvious to be worth saying. Practically every case of account I have cited shows that the duty to account is one fixed primarily by law; the question whether a man received to render account was law rather than fact. He who occupies the land of an infant tenant in socage under a wrongful claim to be guardian in chivalry does as a matter of law receive to render account. The explanation is that Brooke, like any lawyer for generations before and after him, is instinctively using the language of pleadings. "Never his receiver to render account" is simply the plea of the general issue, a denial by the defendant of the facts and of the legal effect of the facts. That Brooke should stress such a simple pleading point might be queried, if cases did not show counsel, with a substantive case that defendant was not in law a receiver, floundering with a totally unnecessary special traverse.[2]

The problem in this passage is the talk of "privity". As far as I know, this passage and two other entries in Brooke[3] are the earliest uses of the word "privity" in relation to the action of account. I am unable to give any irrefutable explanation of this passage, but after careful consideration I put forward this proposition: Brooke had in mind cases where the defendant had wrongfully taken something that belonged to the plaintiff, and meant that *such* defendant cannot be charged unless there is

[1] Cited from 1573 edition which must be taken as the first edition of Brooke's Abridgment; Cowley, *Bibliography*, S.S. (1932), p. xlix.

[2] E.g. Y.B. 2 Hen. IV, 12, pl. 50; Hill's absque hoc is obviously unwanted.

[3] "Privity" is also mentioned in Br. Ab. Accompt, pl. 22 (abridging 49 Ed. III, 10, pl. 2), noted at p. 12 above, and in the marginal note to Br. Ab. Dette pl. 129 (abridging 36 Hen. VI, 9, pl. 5) noted at p. 31 below. In neither case does the printed Y.B. contain any reference to "privity".

privity. It would be difficult, and perhaps impossible, to define privity *simpliciter*, but it is clear that all nominate privities have this in common, that rights and duties exist between the parties which do not exist between strangers. Brooke can therefore be paraphrased as saying that such defendant is chargeable if the plaintiff can show a special relationship, either created by law, such as guardianship, or from the facts, such as defendant's admission that he holds for the plaintiff.

If it be thought that Brooke meant that in all actions of account there must be "privity" between the parties, we are faced with this difficulty, that there is much authority, cited in sect. 14 below, to show that when *A* delivers money to *B* for the use of *C*, then *C* can sue *B* in account. Now there is no trace of any relationship between *B* and *C* ever being required so long as this action was used.

But Brooke's words do suggest that *all* actions of account require privity, and I am of opinion that later views on the necessity for privity are traceable to Brooke. Not only was his Abridgment largely used as being the most recent, but also this particular case is the only case under the heading of Account in Brooke's *New Cases* published in 1578.[1] The many editions of this book show that it was much used, and it must have been familiar to practitioners who never consulted the Abridgment. Coke says:[2] "And to maintaine an action of account, there must be, either a privity in deed by the consent of the partie, for against a disseisor or other wrongdoer no account doth lie; or a privity in law ex provisione legis made by the law, as against a guardian etc." Of the authorities he cites for this, the only one which mentions privity is the case of 2 Mary (Br. Ab. Accompt, pl. 89), quoted above, which is only known in the form Brooke gives it.[3] Coke has merely copied from Brooke.

[1] In Brooke's *New Cases* there is a slip in copying from the Abridgment; the passage reads: "...ou per pretence le def. al use le pl &" (omits the "non" of Br. Ab. Accompt, pl. 89) "ou le defend claim...." The omission of the "non" does not affect the sense of the passage.

[2] Co. Litt. f. 172 a.

[3] The necessity of privity for charging a defendant as bailiff or receiver is asserted by counsel in *Earl of Devonshire's Case*, (1606) 11 Co. Rep. 89, citing 2 Mary and Br. Ab. Accompt, pl. 89. Early editions of Co. Litt. do not cite this case.

Perhaps this case produced new law. There are two cases soon afterwards in which lack of privity was given as a reason for not allowing account[1] and it is interesting to note that they are both cases of wrongful taking. But in *Robsert* v. *Andrews* (1580)[2] account was allowed on these facts: *A* gave money to *B* his servant to give to *C* for the relief (charitable assistance) of *X*. On proof that *C* so received the money, *X* was held entitled to bring action of account. Now this is precisely the kind of case which would go against the plaintiff for lack of "privity" in later days when indebitatus assumpsit would have been used; yet the hearing, a special verdict and long argument on many errors assigned, produced no defence of lack of privity. The case of *Cavendish* v. *Middleton* (1628)[3] must also be considered. Here the defendant obtained money from the plaintiff by a fraudulent misrepresentation, and the plaintiff sued in tort by action on the case. The defendant objected that account was the proper remedy, "but all the court conceived that the action [on the case] well lies, although the plaintiff might have brought an action of account". It thus appears that after the time of Brooke "privity" was required when the *taking* was wrongful, and had no application to any other circumstances. If I am right in thinking that the rule is really part of the theory of seisin, it is almost certainly a good deal older than Brooke.

It thus appears that Coke's statement of the law rests upon a misreading of an ambiguous and difficult passage in Brooke. But when once a rule relating to old learning had become enshrined in Coke's *Institutes* no lawyer of later days would seek further, and so indebitatus assumpsit, as the heir of account, took over "privity"—hardly an asset, and certainly a muddle for later lawyers.

[1] *Anon*, (1567) Dyer 277 b; *Tottenham* v. *Bedingfield*, 3 Leon. 24, Owen 35. In *Paramour* v. *Yardley*, (1579) Plowd. 542 a, it was said that one who wrongly takes profits a prendre to his own use is not accountable, but there is no mention of privity.

[2] Cro. Eliz. 82.

[3] Cro. Car. 141.

SECTION 5

The obligation of a joint tenant or tenant in common to account for receiving more than his just share of profits

The Year Book cases here are numerous and show great confusion. Coke states the law thus: A joint tenant or tenant in common can have account against another only where he has constituted that other his bailiff, except in the case of merchants.[1] This probably represents medieval law, but as the position was so unsatisfactory as to require a statute in 1705,[2] on which modern rights are based, there is no useful purpose in discussing the early law.

It is unfortunate that these obligations have been treated as quasi-contractual; they really form part of our law of property.[3]

SECTION 6

Money paid for an executory consideration which wholly fails

It will be submitted later that the treatment of such claims as quasi-contractual is an accident due to procedural advantages of indebitatus assumpsit over special assumpsit. Nevertheless when a bargain collapses there may be a difference between a claim to recover money paid and a claim for breach of the contract. In some circumstances the first claim may be good, and the second inadmissible because of the nature of the contract. Another point is that at some stage of the development of a legal system a claim for restitution may be allowed at a time when action for breach of such contract has not yet become possible. In the innominate contracts of Roman law it appears that the early remedy was *actio doli* if one party had done his part and

[1] Co. Litt. 172 a, 200 b.

[2] 4 & 5 Anne, c. 16, s. 27. It was decided in 1850 in *Thomas* v. *Thomas*, 5 Exch. 28, that assumpsit for money had and received will not lie by one tenant in common against his co-tenant who has received more than his share of the profits; Parke, B., citing Co. Litt. 200 b, and ruling that the only remedy was by 4 & 5 Anne, c. 16, s. 27.

[3] Many of the rights of common owners in Roman Law were classed as quasi-contractual; Buckland, *Text-book of Roman Law*, clxxxvi.

the other refused to do his, or *condictio ob rem dati* for restitution if a *res* had been transferred; at a later date the contract could be enforced.[1] When the contract is enforceable such remedy will generally be more convenient for a plaintiff, and the older claim for restitution may fall into the background.[2]

Ames says: "The only case in which debt would lie on a quasi-contract was where the plaintiff parted with his money for a consideration which failed, but of this there are not many traces until rather modern times. As late as 17 Henry VI there seems to have been no remedy at common law."[3] In *Appilgarth* v. *Serjeantson* (1438/9),[4] the case he cites for his last statement, the defendant had obtained money from the plaintiff under a promise of marriage, and then married another woman, and "yor saide besechere no remedy hathe by the comone law to get ayeine the said somme". A petitioner's statement that the common law gives no remedy is poor evidence for the rules of law, however useful a guide it may be to the actual working of the system. The position is worth examining more carefully, and for this it is useful to treat some types of contract separately.

(A) Contracts for the sale of land

Transactions relating to land have always been attended with greater formalities than dealings with goods, for obvious reasons, and a contract to purchase land would generally be made under seal. In fact the action of covenant seems to have developed in the thirteenth century largely from such cases.[5] One of the earliest and indisputable cases of recovery of money on a total failure of consideration occurs in connection with such a contract. In 1294 Metingham, C.J., was clear that if one covenants to convey land for money paid, and the land is not conveyed, "in that case I may choose whether I will demand the money

[1] Buckland, *Text-book of Roman Law*, clxxxi.

[2] If our knowledge of Roman Law were limited to the *Institutes* of Justinian commentators might well have concluded that the *actio praescriptis verbis*, given in *Inst.* 3, 24, 1 and 2, applied to any case of a contract, not falling under any named type, where one party had performed his part of the bargain, and might have assumed that that was the sole remedy.

[3] Ames, *Lectures*, 92.

[4] 1 Chanc. Cal. 41.

[5] P. and M. II, 214.

by writ of debt, or demand by writ of covenant that he perform his covenant".[1]

In the Eyre of Staffordshire in 21 Edward I there is a bill in which *R* complains that he had agreed to buy three acres of land from *N*. *R* paid the purchase price to *N*, and the land was marked out, but *N* sold the land to another and refused to return the money.[2] The bill has no endorsement.

No subsequent cases of the Year Book period have been found, and these cases may be regarded as examples of the "equity" jurisdiction which the common law ceased exercising in the earlier part of the fourteenth century. On the other hand there is no authority for saying that such an action of debt was not possible at a later date.

The usual remedy of a purchaser was covenant where there was a deed, and where there was no deed he could have action on the case by 1442.[3] The action on the case only lay at first where the purchaser had paid money, and as his damages could hardly be less than the amount he has paid it is not easy to see why he should ever want the quasi-contractual remedy of debt. Further, there are many reasons why he would not want it; from a plaintiff's point of view debt was an action much inferior to action on the case. The period in which the remedy by debt appears to have been wanted was the period before 1442, in cases of parol agreement, and in that period the buying and selling of land was relatively infrequent; the many Year Book cases of covenant and bonds conditioned for conveying land are concerned with settlements and not ordinary purchases.

Turning to remedies sought from the chancellor, Barbour has shown that although petitioners often sought damages the most frequent request is that the agreement be rescinded and the petitioner be restored to his former position.[4] It is clear that this species of quasi-contract was a regular part of chancery jurisdiction. The implication is that the chancellor gave this

[1] Y.B. 21 & 22 Ed. I, R.S. 598.

[2] *Select Bills in Eyre*, S.S. p. 62, no. 92.

[3] Y.B. 20 Hen. VI, 34, pl. 4, and other cases, cited Ames, *Lectures*, 141, and H.E.L. III, 435.

[4] Barbour, *History of Contract in Early English Equity*, 123, citing many petitions.

remedy because the common law did not, but that is not conclusive.

(B) Contracts for the sale of goods

In earlier medieval law when a parol executory contract for the sale of goods was not enforceable, it was clear law that if one party performed his part of the bargain the other party would have an action. The vendor could sue in debt for the price, and the purchaser could sue for the goods in debt in the detinet. He could not at first use detinue, as that action asserted ownership, and ownership could not pass without delivery. After 1442 the purchaser of a specific chattel could have detinue.[1] When the purchaser sues he must state in his writ the value of the goods;[2] if he likes to be on the safe side and give as the value the amount of the purchase price he has paid he may of course do so. It follows that in these cases it is quite impossible to distinguish between claims for return of money paid and claims for breach of contract.

(C) Money given to the defendant to trade with for the common profit of plaintiff and defendant

In these cases the money is usually said to have been given ad merchandisandum. L. O. Pike has shown the importance of these medieval transactions, and has pointed out that disappointed investors were acquainted with the action of account much as their descendants are familiar with chancery suits. Such transactions are pure contract, and the usual remedy was account, whatever the defendant had done or had not done with the money.

The action of account had two great defects: First, until 1705[3] the action could not be brought against executors. Second, where the defendant had received the money from the plaintiff he could wage his law.[4] If debt was brought to recover the sum due from the defendant, the same defects would be present.

[1] The authorities for these statements are cited in H.E.L. III, 354–5, 420–2.
[2] Registrum Brevium, f. 139. [3] 4 & 5 Anne, c. 16, s. 27.
[4] Y.BB. 7 Ed. II, S.S. 104; 7 Ed. II, 228; 12 Ed. II, 351; 18 Ed. II, 598; 13 & 14 Ed. III, R.S. 288; 16 Ed. III, R.S. ii, 26, and many other cases.

After temporary doubts under Edward I[1] it was settled under Edward III that debt would not lie against executors if deceased could have waged his law.[2] The only way to avoid these difficulties was to secure a deed from the defendant acknowledging the receipt; the plaintiff could then bring debt on the deed as a remedy alternative to account.[3] Or if the recipient of the money had died, he could bring debt against the executors.[4] This remedy by way of debt would generally lead to the recovery of the sum handed over, for unless the defendant had bound himself to render a specified profit (a transaction rather like a usurious loan) there would be no other sum for the plaintiff to claim. But even if the sum handed over was recovered because the defendant had neglected or refused to perform his part of the bargain, the claim is on the contract by deed, and not quasi-contractual on failure of consideration. The matter could be dismissed here, or could have been ignored, if it were not for the following point. It does not follow that, because there is a deed, an action of debt is necessarily brought on the deed, for it may sometimes be brought on the facts.[5] In the time of Henry VI it is pointed out that a deed may promise a sum, or it may merely testify to the receipt of a sum.[6] This distinction is perhaps the cause of the confusion in *Core's Case* (1536).[7] Core gave £20 to *W* for *W* to buy prunes for him in France, *W* acknowledging by bill signed and sealed. *W* died, and Core brought debt against the administrators of *W*. It was clear that *W* would have been liable in account, and the argument for the plaintiff was that as debt lies where account lies (a proposition never true unless qualified) the plaintiff should succeed. Fitzjames, C.J., Portman, J., and Spelman, J., held for the plaintiff, but as they did so on general grounds and on the sealed bill, giving somewhat muddled reasons, it is impossible to say what was the true *ratio decidendi*. Luke, J., in a dissenting judgment

[1] Y.BB. 21 & 22 Ed. I, R.S. 456; 30 & 31 Ed. I, R.S. 238.
[2] Y.B. 17 & 18 Ed. III, R.S. 512.
[3] Y.BB. 28 Ed. III, 22, pl. 28; 42 Ed. III, 9, pl. 7.
[4] Y.B. 16 Ed. III, R.S. ii, 384.
[5] Y.BB. 11 Hen. IV, 79, pl. 21; 13 Hen. IV, 1, pl. 3.
[6] Y.B. 1 Hen. VI, 7, pl. 31, same case as 2 Hen. VI, 9, pl. 5.
[7] Dyer, f. 19 b.

disregarded the bill as not being obligatory in character. Ames came to the conclusion that the remedy was on the contract, and not quasi-contractual on failure of consideration.[1] An argument of Baker, counsel for defendant (only mentioned by Montague, f. 21 b), that if the prunes had been bought then only account would have lain, seems to show that debt was thought of not as generally alternative to account, but as alternative where there had been failure of consideration.

In *Lincoln* v. *Topcliff* (1597)[2] where receipt of money to buy goods for the plaintiff was acknowledged by deed, and the defendant had not bought goods, debt was allowed without argument. But this case, and perhaps *Core's Case*, may more properly be considered as falling under the heading of the next section.

It seems that whatever the remedy used, that remedy was really based upon agreement between the parties.

(D) Other kinds of contracts

Here there is not much authority. In 1292 there is a case of great interest:[3] Alice brought debt against *B*, for that she gave £20 worth of chattels by reason that he was to marry her, and he did not marry her. The defendant relied on a deed showing the gift as absolute and unconditional, but Metingham, C.J., directed that the issue should be on the reason for the gift. Inasmuch as this case shows that the court would go behind a deed, it must be noted that the good sense of Metingham was not followed, for as the common law grew less elastic it accepted Bracton's statement "nec habebit exceptionem pecuniae non numeratae contra scripturam".[4] But the propriety of the action, apart from the technical defence, was not questioned.

There appear to be no subsequent Year Book cases of this type. We have seen that in 17 Hen. VI a remedy was sought from the chancellor[5] and there is an undated petition on the same lines.[6] Action on the case would seem an appropriate

[1] Ames, *Lectures*, 92.

[2] Cro. Eliz. 644. Debt would have lain without a deed, according to *Bretton* v. *Barnet*, (1599) Owen 86, *per* Glanvill.

[3] Y.B. 20 & 21 Ed. I, R.S. 366.

[4] f. 100 b.

[5] 1 Chanc. Cal. 41, and see p. 19 above.

[6] *Chancery Cases*, S.S. no. 61.

remedy, particularly in the undated petition, but the reported cases seem all concerned with the sale of goods.

The published records of other courts yield little material. There is one case, more amusing than important: in 1288 the Fair Court of St Ives held that where *J* paid 9*d.* to *R* for *R* to cure his head of baldness, and *R* failed to effect a cure, then *R* must pay 9*d.* back to *J*.[1] The published records of the Court of Requests show no similar cases.

We have seen in (A), (B) and (C) that a plaintiff who had paid money had a remedy. It must not be thought that in all residuary cases prior to the rise of assumpsit he would be without a remedy. If, for instance, *A* agreed to employ *B* and paid *B* some wages in advance, and then *B* refused to serve, *A* would undoubtedly have a remedy based on the Statute of Labourers.

The general conclusion, admittedly on somewhat slender evidence in parts, is that our law in its historical development bears some resemblance to Roman law; that a quasi-contractual remedy similar to the *condictio ob rem dati* was not unknown, but as various contracts had or acquired some form of action the remedy based on the contract was preferred.

SECTION 7

Money or goods deposited for a particular business (other than with a stakeholder) may be recovered at any time before they have been parted with by the holder in due fulfilment of his instructions[2]

The typical case is where *A* delivers money to *B* to deliver to *C*. The plaintiff is usually said to "bail" money to the defendant, a term which generally means merely delivery; there can of course be no bailment (in the modern technical sense) of money unless it is in a bag or container, in which case detinue lies.[3] Hence our cases have nothing to do with bailment.

[1] *Cases on Law Merchant*, S.S. 1, p. 36.

[2] Ames, *Lectures*, 120, deals with some of these cases, but his references here are unreliable; I have added further cases and worked out some details.

[3] Y.B. 18 Hen. VI, 20, pl. 5.

The Year Book cases give these results:

In the case of money, if *B* does not deliver to *C*, then *A* may bring account against *B*.[1] At a later date *A* could have debt instead of account.[2] If *B* did not deliver because *C* would not accept the money, then *A* had debt against *B*.[3] It is not certain for earlier law whether *B* would be accountable at once or only after he had failed to deliver; probably the action lay at any time,[4] although there is authority for saying it only lay if *B* failed to deliver "soon".[5] If *A* gives money to *B* for *B* to use for *A*'s soul after *A*'s death, the executors of *A* cannot make *B* account, for as to that sum *B* is an executor; Brooke in abridging the case queries whether *B* might not have to account in *A*'s lifetime, as during his life *A* might change his mind.[6] But the question seems to have been settled in 1483, when the Recorder of London asked the opinion of the justices of the Common Pleas on this point, and it was ruled that if *A* countermands the order before it is performed, then *B* must account.[7]

Why did not the court treat *Core's Case* (1536)[8] on these principles? Partly for reasons suggested on p. 22 above, but perhaps the law was not quite as I have just stated it; all the cases seem to imply that the defendant had failed to deliver over or restore in the sense of a positive refusal to do one thing or the other. In *Core's Case* the conduct of the depositee was blameless, for he had merely died.

If *A* delivers goods to *B* to deliver to *C*, then title passes to *C*, and *C* can maintain detinue;[9] if *B* does not deliver, *A* has account against *B*.[10]

[1] Y.BB. 41 Ed. III, 31, pl. 37; 2 Hen. IV, 12, pl. 50; 19 Hen. VI, 5, pl. 10, *per* Newton, C.J., account lies because *A* cannot bring debt or detinue. 18 Ed. IV, 23, pl. 5, *per* Brian, C.J., debt would not lie for want of contract, i.e. *quid pro quo*.

[2] Y.B. 20 Hen. VII, 9, pl. 18.

[3] Y.B. 19 Hen. VI, 35, pl. 72, continued f. 69, pl. 14.

[4] Y.B. 9 Ed. IV, 45, pl. 32, dealing with goods.

[5] Y.B. 21 Ed. IV, 42, pl. 4.

[6] Y.B. 8 Ed. IV, 5, pl. 12; Br. Ab. Accompt, pl. 70.

[7] Y.B. 1 Ed. V, 2, pl. 2.

[8] Dyer, f. 19 b.

[9] Y.B. 12 & 13 Ed. III, R.S. 244.

[10] Y.B. 9 Ed. IV, 45, pl. 32. In Y.B. 20 Hen. VI, 16, pl. 2, Newton says *A* would have detinue, but it is clear from the context that "bail" is there used in its later technical sense.

There is good reason to think that in all these cases the remedy was limited to the recovery of the sum paid to *B*; when debt was used it is difficult to see what other sum the plaintiff could count on, and the defendant could hardly render account of anything but the sum he had received as it was no part of his duty to make profit from the money. In a later case Frowyk, C.J., pointed out that if *A* had suffered particular damage by *B*'s failure to deliver, then *A* could have action on the case "pour le misdemeanor" as alternative to account on debt.[1]

These cases are exactly similar to *Parry* v. *Roberts* (1835).[2] If these cases should be included under a quasi-contractual heading, rather than under the preferable heading of agency in the wide sense of that term, it is clear that medieval common law undoubtedly recognised this species of quasi-contract.

The position of the stakeholder has been excepted from these rules. When money has been deposited with a person to hold until it has been ascertained who is entitled thereto, the depositor is not entitled to sue the stakeholder for the return of his deposit (and obviously not for any sum that may have been deposited by anyone else) unless the event has been determined in his favour.[3]

The right of a person to sue for money which someone else has deposited is a different matter, considered in sect. 14 below.

[1] Y.B. 20 Hen. VII, 9, pl. 18. Perhaps same case as Keilwey, f. 77, pl. 25, cited as 21 Hen. VII.

[2] 3 Ad. & El. 118. Money was handed by the plaintiff to the defendant for the defendant to deliver it to a third person; the defendant alleged that he lost the money; it was held that the plaintiff could recover in an action for money had and received, although it was argued that the proper form of action was on the case for negligence.

[3] Y.B. 1 Hen. V, 11, pl. 21, where account was brought for money deposited by the plaintiff with the defendant for the defendant to pay to J. S. or return to the plaintiff according as J. S. did or did not convey certain lands to the plaintiff. Held: that action does not lie unless J. S. fails to convey by the due date, and as action was brought too soon the writ must abate.

SECTION 8

Quantum meruit

This expression has three meanings;[1] we are concerned only with a case where the defendant has given the plaintiff the right to treat the contract as at an end, and the plaintiff instead of suing for breach of contract prefers to sue for what he has done in complete or partial performance of the contract. The elevation of these cases into a separate kind of liability is merely an accident due to procedural advantages of the "common counts". Medieval law had no need for such a rule. The acts of the plaintiff would generally amount to sufficient *quid pro quo* to support debt against the defendant.[2] This sounds in contract, and is in fact a remedy on a "real" contract. In the case of barter, where the plaintiff has performed, there is no authority, but it is likely that it would have been regarded as reciprocal grants, giving the plaintiff debt in the detinet, and later detinue.

SECTION 9

Account stated

If *A* is accountable to *B*, and duly accounts before auditors, who find a certain sum due, then *B* can sue *A* for that sum by action of debt. The liability was considered as a kind of judgment. If *A* accounted to *B* in person instead of before auditors the position was difficult: to make *A* account a second time offended the idea that a man must not be made to answer twice for the same charge, whilst to enforce the result of the accounting was to recognise *B* as a judge in his own cause. These arguments did not prevail, and an informal accounting was held a bar to a subsequent action, or as grounding an action of debt for the agreed sum.[3] This was accepted doctrine in the early fifteenth century.[4]

[1] Winfield, *Province of Tort*, 157, noted further at p. 88 below.

[2] Ames, *Lectures*, 91, discusses the acts amounting to *quid pro quo*; they cover the conveyance of land, goods, and performance of most types of service.

[3] Y.BB. 45 Ed. III, 14, pl. 13; 13 Rich. II, Ames Found. 20.

[4] Y.BB. 7 Hen. IV, 14, pl. 17; 34 Hen. VI, 43, pl. 4.

There was one serious limitation: the defendant must have been accountable to the plaintiff. Actually account covered a surprising range of transactions, but it might happen that a dealing for which the defendant was not liable in action of account got included in the accounting; if this happened he could not be made liable for it in debt on the auditors' finding,[1] and so presumably not on an accounting with the plaintiff himself.

This shows that liability arose not from the pre-existing claims, nor from any promise, but *from the accounting itself*. When the action of account decayed, lawyers continued to regard the settling of accounts as producing peculiar, if not mysterious, results, both for the creation of liability and for its effects on the claims comprised in the accounting. I deal with this later in sect. 28.

SECTION 10

The obligation to satisfy a judgment

The action of debt lay on a judgment of the king's courts, or of inferior courts.[2] The authority for action on judgments of inferior courts is in some cases late,[3] but it seems declaratory of well-established law. Wager of law was not allowed.

It is now generally accepted that in early law a court's jurisdiction rests on consent of both parties; even in developed Roman Law *litis contestatio* is unintelligible unless it is seen as a species of contract. It might well be claimed that Contracts of Record are not only true contracts, but are the oldest and most respectable branch of the family. However interesting this may be we should not allow it to carry the slightest weight in determining the proper present-day classification of obligations.

[1] Y.BB. 20 Hen. VI, 16, pl. 2; 8 Hen. VI, 10, pl. 25.
[2] P. and M. II, 208.
[3] Y.B. 12 Rich. II, Ames Found. 180, amercement of a court leet; 28 & 29 Eliz. Godb. 49, amercement of court baron.

SECTION 11

Money due under statute, custom, or official duty

No useful purpose would be served by a detailed examination of cases coming under this heading. Generally the remedy was by action of debt. This remedy, and the later one of indebitatus assumpsit, is the only factor common to such cases, whose domain is the whole field of law.

It may be noted however that there might be a claim for goods due by custom, in which case the remedy was detinue.[1]

SECTION 12

Duties arising from a public calling or profession[2]

Persons exercising public callings or professions were liable if they refused to exercise them when called upon to do so, or exercised them in any given case and misperformed them; this liability still exists in those public callings which have survived. The common carrier is a typical case; if he refused to carry in a particular instance he was liable in an action on the case; if he carried and misperformed, he was liable in detinue, or in an action on the case on the custom of the realm, or in assumpsit. The action on the case alleged an "undertaking" and so was difficult to distinguish from assumpsit on an agreement, leading to considerable confusion as to the nature of the liability. To-day the list of public callings has shrunk to the carrier, innkeeper, and sheriff; whether a complaint is of refusal to perform or of misperformance, it appears that tort or contract will account for the liability.

[1] Y.BB. 1 & 2 Ed. II, S.S. 40; 39 Ed. III, 9 b.

[2] The whole of this section is merely an epitome of Winfield, *Province of Tort*, 59–62, 151–5, as I am in full agreement with this analysis. A complete historical account of the liability of the common carrier alone would require a separate monograph; there is no reason to think that that would assist any exposition of the modern law of quasi-contract.

SECTION 13

Recovery of money paid or for services rendered to a third person at request of the defendant

The only action available prior to assumpsit was debt, and the only difficulty was whether a benefit conferred on a third person could possibly be sufficient *quid pro quo*. There is no very early authority, and it was not settled during the Year Book period,[1] but debt undoubtedly lay by 1601.[2]

Actually in all cases where debt was brought it is clear that the defendant promised to pay a certain sum to the plaintiff, for unless a definite sum was agreed upon the plaintiff could not have maintained debt, any more than an innkeeper could have debt in the absence of an agreed price. It follows that the facts which would support such a claim of debt would generally amount to a contract. In *Shandois* v. *Simson* (1601)[2] the court agreed that assumpsit could have been brought.

It is obvious that these cases fall into agency in its wide sense, and have only been treated as quasi-contractual because of their later form of action.

SECTION 14

When A has delivered goods or money to B for the benefit of C, then C has a right of action against B

This proposition is expressed so widely in medieval law that it has attracted much attention.[3]

As regards goods, the title passed, and so the appropriate remedy was detinue.[4]

[1] The first paragraph here is largely taken from Ames, *Lectures*, 93. Y.B. 9 Hen. V, 14, pl. 23, does not allow debt. Y.B. 37 Hen. VI, 9, pl. 18, *per* Moyle, J., in favour. Y.B. 27 Hen. VIII, 24, pl. 3, no agreement among the judges.

[2] Cro. Eliz. 880.

[3] The best account is in Ames, *Lectures*, 118, 119, 238. H.E.L. III, 425, 426, is based largely on Ames. I think I have examined every case on the topic down to the virtual disappearance of action of account, and have nothing new to add, except bringing one aspect of a stakeholder's liability under this general heading, and adding further cases to show that "privity" was not required.

[4] Y.B. 12 & 13 Ed. III, R.S. 244. Goods so handed over are "due immediately" to the beneficiary, *Brand* v. *Lisley*, (1609) Yelv. 164.

Where money was delivered the beneficiary had account.[1] There is some dispute as to when debt was first allowed to the beneficiary as an alternative remedy,[2] but there is little importance in any precise date, since the only point that matters is that debt was probably alternative to account (when the sum demanded was certain) before the appearance of indebitatus assumpsit.[3] The use of debt was merely an alternative remedy, not affecting the principles of liability. All that a plaintiff had to prove was that the defendant did receive the money to the use of the plaintiff. There is much resemblance to a trust, but it appears to be a trust enforceable against the trustee only.[4]

If *B* accepts money from *A* to hold to the use of *A* or to the use of *C* according as an event is determined in favour of *A* or of *C* (i.e. *B* is a stakeholder), then if the event goes in favour of *C*, *C* can sue *B* on the general grounds that *B* now holds money for *C*'s use.[5]

It should be noted that when a beneficiary sues there is no mention of "privity", except in one marginal note in Brooke.[6]

[1] The first case appears to be Y.B. 41 Ed. III, 10, pl. 5, *per* Cavendish *arg.*

[2] H.E.L. III, 426, cites Y.B. 33 & 35 Ed. I, R.S. 238, but as Winfield, *Province of Tort*, 123 n. 1, has pointed out, the beneficiary was not suing. Y.B. 41 Ed. III, 10, pl. 5, is also cited, but it is doubtful whether that can be taken as showing that debt was alternative. Y.B. 36 Hen. VI, 9, pl. 5, *per* Wangford *arg.* is much stronger evidence.

[3] *Core's Case*, (1536) Dyer, 19 b, settled that transferor had debt, and contains arguments that debt and account are concurrent. For beneficiary, Br. Ab. Accompt, pl. 61, gives debt with a query, although in Dette, pl. 129, there is the same statement with no query.

[4] So that if *A* gives money to *B* to give to *C* for *A*'s use, and *B* does deliver the money to *C*, *C* is not accountable merely because of the origin of the transfer; he must receive for *A*'s use: "When one gives the money to me I cannot be held to enquire into all the circumstances whence the money first comes", *per* Hankford, J., Y.B. 2 Hen. IV, 12, pl. 50. At the date of this case the chancellor had hardly evolved any doctrines as to who was bound by a trust, those developments taking place under Ed. IV. But as far as common law goes I do not know of any case where anyone was held bound by the "trust" except the original "trustee".

[5] Y.B. 1 Hen. V, 11, pl. 21.

[6] Br. Ab. Dette, pl. 129, when money is paid to W. N. to my use, I have debt or account against him; the marginal note is "Vers estranger sans privitie". Late cases of debt or account brought by beneficiaries in which there is no mention of "privity" are: *Paschall* v. *Keterich*, (1557) Dyer, 151 b; *Robsert* v. *Andrews*, (1580) Cro. Eliz. 82; *Shaw* v. *Norwood*, (1600) Moore 667; *Clark's Case*, (1614) Godb. 210; *Harris* v. *de Bervoir*, (1624) Cro. Jac. 687, where plaintiff is called "cesty que use"; *Starkey* v. *Mylne*, (1651) Roll. Ab. 32, pl. 13.

SECTION 15

The Nature of Action of Account[1]

One fact stands out quite clearly: the duty to account was imposed primarily by the law.[2] There is nothing peculiar in this, for the same remark could be made about many cases of debt; in fact medieval theory required the law to determine most duties. But can we generalise about the action of account, and find rules which will determine when the action lay; was there a general theory, or merely an empirical selecting of particular circumstances? Langdell thought there was a general theory. He lays down five requirements for liability:

First, the defendant must have received property not belonging to himself, and second the plaintiff must be the owner of the property in respect of which the obligation is sought to be imposed.[3] This can be tested by considering two sets of facts:

(i) As we have seen in the last section, if *A* delivered money to *B* for the use of *C*, then *C* can bring account; or if goods had been delivered, *C* could have detinue. Clearly the property in the goods passed, and there is authority for saying that the property in money would pass to the beneficiary.[4] It is obvious that in these cases there is intent on behalf of the transferor that the property should pass to the third person, and the transferee takes the goods or money on that basis.

But on the same facts it is equally true that *A* can bring account against *B*, and *A* or *C* will win according to which one sues first (above, sect. 7). If we accept Langdell, then we have to say either that the property passes to *C*, and then passes back to *A* if he first sues out a writ, or that the property hovers ghost-like until either *A* or *C* sues. This is bad enough, without

[1] This is mostly a criticism of Langdell's theory of account, in *Equity Jurisdiction*, H.L.R. II. I think that his conclusions have previously been accepted generally. Belsheim, *The Old Action of Account*, H.L.R. XLV, 466, which is a useful general description of the action, is critical of some points made by Langdell.

[2] It is difficult to prove such a statement, except by the whole tenor of the cases. The simplest illustration is the fact that a deed does not destroy any common law duty to account; Y.B. 42 Ed. III, 9, pl. 7, and cases cited above, p. 22.

[3] H.L.R. II, 243.

[4] Y.B. 41 Ed. III, 10, pl. 5, *per* Cavendish.

considering the possibility that *B* might have acquired the ownership by a tortious act.[1]

Whatever the Year Book theory may have been, it seems fairly clear that the property did not pass to the beneficiary in later law. In *Hinson* v. *Burridge* (1594),[2] *B* sold and delivered goods to *D*, factor of the defendant, "al use le defendant", and the Court of Exchequer Chamber held that "le sale est al D, & le use n'est que confidence que ne done property al defendant en ley". Yet it is obvious that account lies against the factor.

(ii) The second case is where the defendant has received property from the plaintiff, so that the defendant is a bailiff or factor (a factor is merely a species of bailiff). It appears that the property would pass to the defendant.[3] If the bailiff or factor sells goods, whose is the money? If the purchaser knows the vendor is selling for a principal, then we have case (i) above, and this would often be the case with bailiffs of manors. But when a factor sells he is ostensibly principal, and a purchaser would pay him with intent that he should be owner of the money; further, it is difficult to believe that a factor was expected to keep the identical coins he received and hand them to his principal, yet Langdell implies this by asserting with some force that if a defendant keeps money received and debits himself he is a debtor and not accountable. The difficulty in accepting Langdell's views is not lessened by the fact that he omits to cite any authority whatever on these points.

It is not easy to see why any one should ever bother about such a point, so far as the action of account is concerned. The plaintiff in this action did not demand a sum of money, or goods; he simply asks for an account. If a defendant admits that he became bailiff, or factor, then he is accountable, without the plaintiff having to prove that the defendant ever received anything.[4] In fact the plaintiff's real case may well be that the

[1] Ames, *Lectures*, 180, for acquiring property by a tort.

[2] Moore, K.B. 701.

[3] Ames, *Lectures*, 116, and cases there cited, particularly 2 Rich. III, 14, pl. 39.

[4] Plaintiffs did often count that a factor had received so much by the hands of J. S. but this practice was devised to escape wager of law, as we are clearly told in Y.B. 16 Ed. III, R.S. ii, 26.

defendant has not received something when he ought to have done so,[1] but all that is a matter for the auditors.[2]

It is doubtful how far we can accept casual Year Book statements on ownership. Then, as now, men talked of *A* having *B*'s money when they meant that *A* owed *B* such sum of money.[3] The allegation "quod fuit receptor denariorum suorum"[4] may be compared with the "detinet" clause in the writ of debt;[5] the old wording continues long after the recognition of the distinction between *commodatum* and *mutuum*. Later medieval law certainly recognised that a man could not own money in the possession of another, in the sense that detinue would not lie, unless the money was in a container and could in fact be treated as if it was not money.

The only other point on which I differ from Langdell is in the matter of "privity", which is discussed in sect. 4 above.

These arguments conflict with everything of importance in Langdell's theories. I can put forward no better theory, for the simple reason that I do not believe there ever was any general theory. It seems that certain persons in certain well-known categories were liable to account, the selection of these categories having been made by pure empiricism.

SECTION 16

The use of action of debt instead of action of account, and the virtual disappearance of account as a common law action

There was only one reason why a plaintiff would want to bring debt instead of account, namely because it was a shorter procedure. It would not help him to evade wager of law, or sue executors, or simplify pleading. He would however get the proceedings finished in one hearing instead of the double hearing

[1] Y.B. 10 Hen. VII, 6, pl. 12, continued f. 30, pl. 28.

[2] Proceedings before auditors come into Y.BB. mostly by a successful party bringing debt for the sum found due, and the defendant setting up a defence that the auditors denied or allowed an improper item.

[3] Maitland, *Forms of Action*, 357.

[4] Y.B. 2 & 3 Ed. II, S.S. 34. The form in Registrum Brevium, f. 135 a, is "receptor denariorum ipsius B" (plaintiff).

[5] Registrum Brevium, f. 139 a.

in account. The use of debt was simply a new method of enforcing liability which was already recognised; I have not found any case in which the use of debt widened the liability. Hence there seems to be no point in trying to decide exactly when the practice was first allowed, and it is quite enough to say that it was probably well established in the time of Brooke.[1] Debt could only be used when the sum claimed was certain.

The relation of debt and account has caused some difficulty, as is shown by the following quotation: "It is sometimes asserted that Debt, and later Indebitatus Assumpsit, superseded Account. Such an assertion rests upon a confusion of ideas; for a *debt* was necessary to support either of those actions, and obviously an obligation to account could not constitute a debt."[2] The statements in the last sentence are self-evident, and yet contain a latent fallacy. Suppose that *A* gives money to *B* for the use of *C*, then *A* or *C* can succeed in account against *B*. At first *A* could not have debt,[3] but later he could.[4] It took longer for the beneficiary to be allowed to bring debt, and counsel could still argue in 1624 that although *A* has debt or account, *C* has only account.[5] In other words the scope of the action of debt was enlarged. A given set of facts would at one time support action of account alone, and then later the facts would support action of debt as alternative. Of course a debt was necessary to support an action of debt, because you can only define "a debt" and "action of debt" in terms of each other; as the action grew in scope, so did the conception of a debt. Nobody can think that an obligation to account can constitute a debt, but the one obligation is not turned into the other; there is *growth*. This enlarged scope of debt meant that plaintiffs used that action in preference to account. If this does not mean that action of debt superseded action of account, we have lost sight of the meaning of our language.

[1] See p. 31, n. 3 above.

[2] Barbour, *History of Contract in Early English Equity*, 15. It is founded on Langdell, H.L.R. 11, 253, 254, and is a convenient summary of Langdell's views.

[3] The much cited Y.B. 41 Ed. III, 10, pl. 5, is inconclusive.

[4] Certainly by *Core's Case*, (1536) Dyer, 19 b.

[5] p. 31 above; *Harris* v. *de Bervoir*, Cro. Jac. 687.

Why did action of account fall into disuse? Two defects have been mentioned, wager of law and inability to sue executors,[1] but these defects were not peculiar to this action. Ames says that the procedure was cumbrous and slow;[2] this is true, but is there any reason for thinking that the double proceedings were any worse than accounts in the Chancery Division at the present day? That the chancery court should have taken over most of the sphere of account is the more remarkable since it was the only action in which common law courts "acted on the person". The judgment was that the defendant do account, and if he would not, then "il demeura in prison, & demeura tanque qu'il ait accompt".[3] It was also described as an equitable action.[4] The decay of the action was probably due to the common law rules of evidence; accounts are precisely the field where "discovery" of documents is most called for, and where inquisitorial methods are useful, at least to the plaintiff. The proceedings in account before a sixteenth-century chancellor may be compared with a present-day public examination in bankruptcy; the defendant was not allowed to feel too comfortable. Except in simple cases where debt could be used, it appears that it had become usual to go into chancery by the latter part of the seventeenth century.[5]

[1] p. 21 above.

[2] Ames, *Lectures*, 117.

[3] Y.B. 22 Ed. III, 16, pl. 56.

[4] Accounte veot estre amene p equite & nemye p reddour de ley; *per* Stonore, J., Y.B. 19 Ed. II, 656. Accompt doit estre mene p equitie & p bon foye; *per* Herle, C.J., Y.B. 3 Ed. III, 10, pl. 30.

[5] Chancery jurisdiction over matters requiring the taking of accounts had existed since the fifteenth century; Barbour, *History of Contract in Early English Equity*, 16. The earliest chancery reports do not show this as a regular part of chancery jurisdiction; in the latter part of the seventeenth century several cases are reported; *Equity Cases Abridged*, under heading of Account. Common law actions of account still occurred in the earlier seventeenth century, but actual actions of account were not so frequent as references to account in arguments. The common law action was revived in *Godfrey* v. *Saunders*, (1770) 3 Wils.K.B. 73; Street, *Foundations of Liability*, iii, 110–111. The editor of the 1790 edition of Croke's Reports added a note to *Robsert* v. *Andrews*, Cro. Eliz. 82, mentioning the extension of account by 4 & 5 Anne, c. 16, s. 27, and saying: "the most ready and effectual way to settle these matters of account is by bill in the Court of Equity; and therefore actions to compel a man to bring in and settle his account are now seldom used".

Part II

FROM THE RISE OF INDEBITATUS ASSUMPSIT TO THE SETTLEMENT OF THE MAIN PRINCIPLES

SECTION 17

General

FROM the late seventeenth century onwards the growth and extension of indebitatus assumpsit were the dominant factors in the development of quasi-contract. The bulk of our quasi-contract consists of the old indebitatus counts, and hence Part II of this book is largely concerned with the extension of indebitatus assumpsit. In fact I have paid so much attention to indebitatus assumpsit that it may be thought that I consider this action to be the beginning and the end of the matter; I do not think so, and in sect. 31 I give some reasons for holding that there are claims of a quasi-contractual nature that are independent of the old indebitatus counts. All tendency to classify or define modern law in terms of obsolete procedure is to be abhorred, but it must be recognised that the forms of pleading have in the past dominated our law, and that much of our law, particularly the realm of "implied contract", is still limited by rules and conceptions formed round the old system of pleading.

As my field is limited to tracing the establishment of main principles only, I have not given references to modern digests which purport to summarise the whole topic, nor have I cited the more recent cases which merely affirm established rules. There has been a certain amount of recent writing on quasi-contract, particularly in the United States, but as this does not deal with the historical aspects I have not referred to this material.

SECTION 18

The Rise of Indebitatus Assumpsit generally

The rise of this action is obviously the most important event in the history of quasi-contract. There is no need to deal with its origin and early history in detail, because the ground has been well explored.[1] What may now be described as the accepted

[1] Notably by Ames, *Lecture*, xiv. Street, III, Ch. xv, is an excellent summary. H.E.L. III, 441 seq. I have examined the original authorities, and, apart from a point discussed in the next paragraph, have nothing new to add.

view is that the action was recognised during the latter part of Brooke's lifetime, and passed through these stages:[1] (i) The defendant must be indebted and must make a subsequent promise to pay. (ii) In the Queen's Bench the fact that he was indebted on a simple contract was sufficient for the court to imply a subsequent promise, at least from *Edwards* v. *Burre* (1573),[2] although the Court of Exchequer Chamber often reversed such judgments. (iii) *Slade's Case*[3] endorsed the practice of the Queen's Bench. (iv) Soon the action was extended to cases where the defendant was not technically indebted, but where there was a genuine contract. (v) The action was not concurrent with debt immediately after *Slade's Case*,[3] since (apart from the rule as to record, specialty, or rent, where debt was retained for special reasons) the action rested on a promise implied in fact, the implication being made from the acts of the parties; the idea of consent was whittled away slowly, so that the duties imposed primarily by law could only be thus enforced towards the end of the seventeenth century.

Whilst agreeing with these propositions, I think that Ames and Sir William Holdsworth are too dogmatic in asserting that the assumpsit was always real (i.e. express or implied from the facts) until towards the end of the seventeenth century; Sir William Holdsworth goes so far as saying that the later assumpsit independent of real agreement "was not *suggested* till the end of the seventeenth century".[4] There is some evidence that the Queen's Bench during the last quarter of the sixteenth century was inclined to consider indebitatus assumpsit as a substitute for debt in a wide range of cases. In *Stanton* v. *Suliard*[5] assumpsit was brought by a sheriff for his fees for executing a judgment, the plaintiff alleging that the defendant promised to pay such sum as was allowed by statute. Since a promise to pay would be alleged whether there was or was not a promise, we cannot say whether the action was on a real or implied

[1] The cases which establish these propositions are cited in Ames and Street, p. 39, note 1.

[2] Dal. 104, pl. 45. [3] (1603) 4 Co. Rep. 92 b.

[4] H.E.L. III, 450; the italics are mine.

[5] Cro. Eliz. 654, also reported as *Suliard* v. *Stamp*, Moore, 468, *Stamton* v. *Suliard*, Moore, 699; different terms are given, making the date 1597/8.

promise, although the latter seems more probable. Glanville, J., in the Exchequer Chamber said that a sheriff cannot have debt for his fees, citing the inconclusive case of *Gurney* v. *Somes* (1594).[1] The rest of the court affirmed the judgment for the plaintiff, on the grounds that the execution was made at the request of the defendant and was a benefit to him, with no mention of any promise to pay. A much stronger case, leaving little room for doubt, is *Lord North's Case* (1588).[2] The Queen granted to Lord North and his heirs the fines *pro licentia concordandi*, and one would not pay the fine, for which indebitatus assumpsit was brought. Fenner argued that it was a real fine, and so debt did not lie, and that "there is no contract between the parties, but the same is given by law". Gawdy, J., thought that the action lay, because debt would lie notwithstanding that it was an inheritance, and precedents were cited to prove the last proposition. Wray, C.J., said that the action would lie because there was no other remedy.

I do not suggest that indebitatus assumpsit was then allowed for money due by law as opposed to money due by agreement, since the Court of Exchequer Chamber would hardly have allowed such a doctrine at a time when they were insisting on express promise as a basis for indebitatus assumpsit. But it is clear that the possibility of such use of the action was present to the minds of those in the Queen's Bench. When in 1689 indebitatus assumpsit was brought for a fine due from a copyholder[3] counsel for the plaintiff relied on *Mayor of London* v. *Gorry*,[4] whilst Eyres, J., in holding for the plaintiff seems to have been largely influenced by *Lord North's Case*.[2]

The extension of indebitatus assumpsit to cover various types of claims is dealt with in succeeding sections. The problem of consideration is discussed in the following section, and the basis of claims for money had and received in the light of later cases is discussed in sect. 30.

[1] Cro. Eliz. 336.

[2] 2 Leon. 179. The case was in the Queen's Bench, which was at that time concerned to extend the scope of assumpsit. Fenner, whose phraseology anticipates later usage, began his long period of judicial office two years later.

[3] *Shuttleworth* v. *Garnet*, 1 Show. K.B. 35, 3 Lev. 261, Comb. 151.

[4] 2 Lev. 175, 3 Keb. 677, 1 Vent. 298.

SECTION 19

Consideration in Indebitatus Assumpsit

In indebitatus assumpsit it was alleged that the defendant "being indebted did promise", the promise being in reality subsequent to the indebtedness at the time when the promise had to be express,[1] and remaining subsequent in theory when the promise became a fiction and was implied by the court. The nature of the "indebtedness" alleged can be seen most clearly if we consider the classes of cases in which indebitatus assumpsit was used at the time of the death of Chief Justice Holt in 1710. Four classes can be distinguished:

(1) Agreements where the defendant had promised to pay a sum certain in exchange for a *quid pro quo*, such as goods sold and delivered for a fixed price, creating a true debt. It is curious that here indebitatus assumpsit should be brought, resting on an implied promise, when there is already an express promise. Ames has undoubtedly supplied the explanation;[2] the force of the original promise was spent in creating a debt, and a new promise was required if assumpsit was to be brought. The new promise was implied after *Slade's Case* in 1603.[3]

(2) Cases where there was no oral or written agreement between the parties, as in the case of a man lodging at an inn under what we now call a tacit agreement to pay reasonable remuneration; no technical debt was created. *Young* v. *Ashburnham*[4] shows us that in 1587 there was no remedy, lack of express promise excluding assumpsit and lack of a sum certain excluding debt. During the seventeenth century it became settled law that indebitatus assumpsit would lie to charge a defendant on an implied promise to pay what is reasonable.[5]

(3) True debts (in the sense that action of debt would lie)

[1] Clearly shown in *Anon*, (1572) Dal. 84, pl. 35.
[2] *Lectures*, xiv.
[3] 4 Co. Rep. 92 b.
[4] (1587) 3 Leon. 161.
[5] The earliest case is *Warbrook* v. *Griffin*, (1609) 2 Brownl. 254; Moore, 876. Ames, *Lectures*, 154, 155, points out that this doctrine was not readily accepted. Two cases can be added to those he cites. *Rolte* v. *Sharpe*, (1626) Cro. Car. 77, a promise to pay a tailor *tantum quantum etc.* is good "being the common course and alweies allowed". This is confirmed as a general proposition by *Canwey* v. *Aldwyn*, (1639) Cro. Car. 573.

not arising from simple contract. The class of non-contractual debts includes statutory penalties, penalties under by-laws, some customary dues, and other similar cases. There was no test for determining whether a sum certain due was a technical debt; it was a matter of law in each case. In the later seventeenth century it was a frequent argument of counsel that indebitatus assumpsit would lie wherever debt would lie. The first case where debt of this type was enforced by indebitatus assumpsit was *Mayor of London* v. *Gorry* in 1676, where it was said "...it being agreed that debt lieth, a fortiori an indebitatus".[1] This case was followed by others in which similar sums due were enforced by indebitatus assumpsit.[2] The reason for using this form of action was to enable a plaintiff to avail himself of simpler pleading and leave the question of the custom to the jury; wager of law was not allowed in such cases. Hence there were technical grounds for Holt's objection to the prevailing practice.[3] At the time of Holt's death the only kinds of debt on which indebitatus assumpsit could not be brought were judgments, specialty, and arrears of rent.

(4) Where there was no true debt, and no contract express or tacit. There is some doubt whether money paid by mistake[4] and money paid where there was a failure of consideration[5] created a technical debt; if they did, then such cases belong to class (3) above. The use of indebitatus assumpsit for both types of claim was well established in Holt's time.[6] Where *A* collects rents or receives profits due to *B*, account sometimes lay at the suit of *B*,[7] but there are no cases where debt was used; indebitatus assumpsit was established for such cases by 1678.[8] It is certain that a debt could not arise from the fact that the defendant had wrongfully carried off the plaintiff's property and

[1] 3 Keb. 677, 2 Lev. 174, 1 Vent. 298.

[2] This development is traced in H.E.L. VIII, 90–2, where the cases are cited.

[3] *Shuttleworth* v. *Garnet*, (1689) Comb. 151, 3 Lev. 261, 1 Show. K.B. 35.

[4] Sect. 3 above. [5] Sect. 6 above.

[6] They are treated as beyond doubt, the former in *Tomkins* v. *Bernet*, (1693) Salk. 22, and the latter in *Holmes* v. *Hall*, (1704) 6 Mod. 161.

[7] Sect. 4 above.

[8] *Howard* v. *Wood*, (1678) 2 Lev. 245, 2 Show. K.B. 21.

sold it,[1] yet indebitatus assumpsit was allowed for waiver of conversion in 1705.[2]

The "indebtedness" is therefore a bracketing together of different types of legal obligation. The promise does not give any difficulty, because it was not traversable after *Slade's Case*.[3] Whereas a plea of non assumpsit in express assumpsit put in issue the making of the alleged promise, in indebitatus assumpsit that plea put in issue the facts on which the alleged indebtedness arose. The consideration for the implied promise is the indebtedness.[4] According to early cases the plaintiff need not allege consideration in his declaration,[5] although he should disclose his substantial cause of action.[6] The plaintiff's declaration states briefly that, for example, money was lent, and continues "the defendant therein being indebted the defendant then and there in consideration thereof assumed and promised to pay".[7]

The consideration for the implied promise was always the same, namely, "indebtedness", whether the real cause of action was contractual or not. When the indebtedness arose from contract, as in the common counts for work and labour done or price of goods sold and delivered, the plaintiff had to establish that there was a contract between him and the defendant, and he might fail to do so because he could not show consideration to support that contract; any lack of consideration related to the precedent contract and not to the implied promise to pay. If however the indebtedness was created primarily by law, as in the case of a customary duty, consideration or its absence was irrelevant for ascertaining whether the duty existed. This means that the courts have had to work a system where in the same form of action it was sometimes necessary to prove true consideration (as opposed to the formal consideration created by the

[1] Sect. 4 above.

[2] *Lamine* v. *Dorrell*, 2 Ld. Raym. 1216.

[3] (1603) 4 Co. Rep. 92 b. See also note 7 below.

[4] This view of the consideration appears as early as 1583, *Anon*, Godb. 13.

[5] *Whorwood* v. *Gybbons*, (1587) Gould. 48, pl. 6; *Brinsley* v. *Partridge*, (1612) Hob. 88.

[6] *Holme* v. *Lucas*, (1625) Cro. Car. 6, shows a technical reason for this; there cannot be indebitatus assumpsit on a judgment or specialty.

[7] This form appears in Aston, *Entries*, (1661) p. 51, and subsequent books of Entries. The allegation of a promise to pay was necessary in all cases until the Common Law Procedure Act, 1852, s. 49.

"indebtedness") and sometimes unnecessary. On the classification I have given, true consideration is necessary for (1) and (2), and unnecessary for (3) and (4). Classes (1) and (2) were earlier in date, and were presumably more frequent in practice as they are everyday occurrences. Hence there has been a tendency to treat rules for the first two classes as if they applied to all actions of indebitatus assumpsit. The result has often been confusion. An example of confusion occurs in *City of York* v. *Toun*[1] in 1700 when indebitatus assumpsit was brought for a fine imposed on a man for not holding the office of sheriff; counsel argued that the action could not lie where there was no assent and no consideration. To say that a promise should be implied only where there are some facts to warrant the implication is a coherent argument, whereas to drag in lack of consideration is to suppose that the "indebtedness" must always arise from contract, which was an untenable proposition in 1700. Another example of potential confusion is *Mayor of London* v. *Hunt* (1681)[2] where a customary payment for "weighage" on bringing goods into the port of London was enforced by indebitatus assumpsit. It was assigned as an error that there was no consideration, but the court found that "he had the liberty of bringing [the goods] into Port, which is a place of safety, and therefore implies a consideration in itself". If the indebtedness is solely a customary due, within class (3) above, then consideration should be irrelevant. In public ports the obligation to pay dues rested on the fact that such ports were franchises derived from charter or prescription;[3] in later times provisions for dues were made in statutes setting up port authorities.

[1] 5 Mod. 444.

[2] 3 Lev. 37, where the action is called simply "assumpsit". Winfield, *Province of Tort*, 180, treats this case as ordinary assumpsit. I think it was indebitatus assumpsit. Levinz does not distinguish the forms of assumpsit; he calls the following actions just "assumpsit": *Mayor of London* v. *Gorry*, 2 Lev. 174, clearly indebitatus assumpsit in 3 Keb. 677; *Barber Surgeons* v. *Pelson*, 2 Lev. 252, where there is allegation of indebtedness and promise to pay; *Shuttleworth* v. *Garnet*, 3 Lev. 261, called indebitatus assumpsit in 3 Mod. 239 and 1 Show. K.B. 35.

[3] Hale, Hargraves Law Tracts, *De Portubus*, cited with approval by Lord Halsbury in *Hunter* v. *Northern Marine Insurance Co.*, (1888) 13 App. Cas. 717 at 722.

SECTION 20

Claims for "Money Paid"

Claims which would in the past have been included in the general heading of indebitatus assumpsit for money paid by the plaintiff at the request of the defendant are to-day divided into such headings as "Money paid at the request of another", and "Compulsory payment of another's debt".[1] The starting-point appears to be the conception of a precedent request supporting a subsequent promise. The precedent request could, as the development took place, be actual, tacit, or implied by law. Historically they must all be treated as varieties of the same species.

For express assumpsit it was necessary that the consideration should not have been past. Sir William Holdsworth has dealt fully with this rule[2] and only an outline of the development need be given. That past consideration will not support a promise appears as settled law in 1553.[3] By 1568[4] it is said that such a promise would be enforceable if the precedent act had been done at the request of the promisor, and this view became enshrined in *Lampleigh* v. *Brathwait* in 1616;[5] where *A* requests *B* to endeavour to obtain a pardon for him, and *B* makes such endeavour, and *A* subsequently promises to pay £100 to *B* for his pains, *B* can succeed in assumpsit. The analysis suggested in the judgment, and followed for over 200 years, was that the consideration was past, but was nevertheless good consideration because of the precedent request. The assumpsit relied on was the express subsequent promise to pay.[6] In the nineteenth century the true analysis became established, namely, that the request is a promise to pay reasonable remuneration for the service, and that any subsequent promise "may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service

[1] As in Jenks, *Digest*, ss. 719, 709; Halsbury, *Laws of England*, VII, ss. 363–74.

[2] H.E.L. VIII, 1–48.

[3] *Andrew* v. *Boughey*, 1 Dyer at f. 76 a.

[4] *Hunt* v. *Bate*, 3 Dyer 272 a.

[5] Hobart, 105.

[6] Many cases similar to *Lampleigh* v. *Brathwait* are collected in Viner Ab. Action, Q., and later cases in the notes to that case in Smith, L.C.

was originally rendered".[1] On either the seventeenth- or the nineteenth-century analysis such claims are clearly based on agreement between the parties.

Whilst cases of express assumpsit on a precedent request are frequent in the reports, there are few reported cases of indebitatus assumpsit. This is probably due to the fact that in indebitatus assumpsit there was little difficulty over consideration and the cases decided were not worth reporting; as the express subsequent promise to pay became untraversable the attention of lawyers was focussed on the "indebtedness", for if that was established there was always good consideration.[2] The cases in the seventeenth-century reports are generally concerned with the distinction between principal and collateral agreements. Where *A* requests *B* to supply goods to *C*, if the construction is that there is a contract of sale between *A* and *B*, then *B* can recover the price by indebitatus assumpsit from *A*.[3] If the allegation was that *B* at the request of *A* sold goods to *C*, then the principal contract is between *B* and *C*, and *A* is only liable, if at all, on a collateral contract of guarantee. This was not at first appreciated, and on such facts it was decided in 1677[4] that *B* could succeed against *A*, despite the argument that any debt must be due from the purchaser *C* to the seller *B*. Rainsford, C.J., dissented in that case, and it has not been followed.[5] The distinction whether the principal contract was between *A* and *B*, or between *B* and *C* was well understood by the time of Holt, C.J.;[6] the provision of the Statute of Frauds as to guarantee had doubtless helped to make this distinction important.

Actions for money paid at the request of the defendant followed the line given in the last paragraph. In *Butcher* v. *Andrews* (1697)[7] it was held that money lent by the plaintiff to

[1] *Stewart* v. *Casey*, [1892] 1 Ch. *per* Bowen, L.J., at 116; cited H.E.L. VIII, 39.

[2] Sect. 19 above.

[3] *Stonehouse* v. *Bodvil*, (1662) T. Ray. 67; *Hart* v. *Langfitt*, (1702) 2 Ld. Raym. 841, S.C. *Hart* v. *Longfield*, 7 Mod. 148; *Jordan* v. *Tompkins*, (1704) 2 Ld. Raym. 982, S.C. *Jordan* v. *Thomkins*, 6 Mod. 78.

[4] *Kent* v. *Derby*, 1 Vent. 311.

[5] On similar facts in *Rozer* v. *Rozer*, (1680) 2 Vent. 36, judgment for plaintiff was stayed on motion.

[6] *Hart* v. *Langfitt* and *Jordan* v. *Tompkins*, note 3 above.

[7] Carth. 446, 1 Salk. 23, Comb. 473.

defendant's son could not be recovered by indebitatus assumpsit, but should be declared on specially. Holt, C.J., said that "If it had been an indebitatus for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good." Obviously if it was alleged that the loan was made to the third person the debt is due from that third person and not from the person at whose request it was made. This view was followed.[1] Where there has been an actual payment to a third person at the request of the defendant, the defendant has been liable for "money paid" without question of the form of action.[2] What amounts to "payment" gave rise to several decisions in the first half of the nineteenth century.[3] A promissory note, if accepted by the creditor as payment, has been held sufficient,[4] whereas the mere giving of a bond is not equivalent to payment.[5] Difficulty arose from the decision in *Moore* v. *Pyrke* (1809);[6] an undertenant whose goods were distrained for rent by the head landlord could not recover by "money paid" against his landlord, the argument being that the plaintiff had not "paid money" for his landlord because the proceeds of distress vest directly in the distrainor. This case was disapproved in *Rodgers* v. *Maw* (1846)[7] where Pollock, C.B., held that money raised on *fi. fa.* is "money paid" by the judgment debtor to the creditor. In *fi. fa.* the money realised by the sheriff does not vest directly in the creditor but has to be handed over to him, so that the cases could be distinguished. The general rule was clearly stated by Parke, J., in 1829:[8] "That count [money paid] cannot be maintained without proving actual payment, or that which is

[1] *Marriott* v. *Lister*, (1762) 2 Wils. K.B. 141. In *Stevenson* v. *Hardie*, (1773) 2 W. Bl. 872, loan made to a wife at the request of her husband was recovered by indebitatus assumpsit against the husband, but this clearly rests on the peculiar legal position of a married woman.

[2] E.g. *Alcinbrook* v. *Hall*, (1766) 2 Wils. K.B. 309, where defendant lost money on bets on a horse race, and the plaintiff paid for him at his request; the only point in dispute related to the gaming laws.

[3] Similar points arose in claims for "money received"; see p. 79.

[4] *Barclay* v. *Gooch*, (1797) 2 Esp. 571, approved in *Rodgers* v. *Maw*, (1846) 15 M. & W. 444.

[5] *Taylor* v. *Higgins*, (1802) 3 East 169; *Maxwell* v. *Jameson*, (1818 2 B. & Ald. 51.

[6] 11 East 52.

[7] 15 M. & W. 444.

[8] *Power* v. *Butcher*, 10 B. & C. 329, at 346.

equivalent to payment". The most important applications relate to cases where there is an account with underwriters and a policy issued states that the premium has been paid; the broker can recover the premium from the insured as "money paid" whether or not the broker has actually paid the underwriter or settled accounts with him.[1] What is "equivalent to payment" appears to be a matter for the court in each particular case.

If there has been "payment", then we have to consider whether there has been a precedent request. In theory it was always necessary that there should have been a request; the form of pleading now in use still claims: "money payable by the defendant to the plaintiff for money paid by the plaintiff to one A.B. for the defendant at his request. Such request was made by the defendant verbally...*or*, by letter...*or*, was implied under the following circumstances:...."[2] Actual request does not need discussion. The possibility of an implied request came before the court in *Hayes* v. *Warren* (1731)[3] on an assumpsit for work and labour done, where the assumpsit was subsequent and there was no allegation of a precedent request. "The Court declared, that they took the rule of law to be, that no past consideration is sufficient to support a subsequent promise, unless there was either a request of the party express or implied at the time of the performing the consideration. Some acts, they said, were of such a nature as that the law would imply a request, as the being bail for one, curing one's child of a sudden sickness, performing the part of a servant etc."[4] No distinction was made between an implication of fact and one of law. In Strange's report it appears that a request would have been implied if it appeared that the work was done for the benefit of the defendant. It is also suggested in Buller's *Nisi Prius*[5] that a request might be implied from the fact that the thing done benefited the defendant. This has been a source of confusion; if the defendant benefits from the act done or the money paid, that may be good evidence to imply a request from the facts, but that it does not in itself raise an implication of a request

[1] Recognised in *Power* v. *Butcher*, (1829) 10 B. & C. 329.
[2] Bullen and Leake, 8th ed. 1924, 263.
[3] 2 Barn. K.B. 55, 71, 140; 2 Stra. 933.
[4] 2 Barn. K.B. at 141.
[5] p. 147.

was clearly explained by Lord Kenyon in 1799.[1] Whether a request is to be implied from the facts, that is whether there is a tacit contract, is a question to be decided on the facts in each case. Precedent can be of little assistance. The general proposition is that if *A* performs services for *B* in circumstances where *B* would normally be expected to pay for them, then if *B* knows of these services at the time he must be taken to have agreed to pay for them.[2] Ratification of the act done may also give liability.[3] Where the request is an inference from the facts there is nothing quasi-contractual about the matter; it is genuine contract.

In some cases a precedent request may be implied by law. There is little early authority. One instance mentioned in *Hayes* v. *Warren*[4] where the court would imply a request, that is the "curing one's child of a sudden sickness", suggests that a request might be implied from a moral obligation. Such implication from moral duty was made in the much cited case of *Watson* v. *Turner* (1767),[5] but there was an express subsequent promise. According to Lord Ellenborough in 1802[6] a precedent request cannot be implied by law from a moral obligation unless there is a subsequent express promise. For a true quasi-contractual claim for money paid it is necessary that both the precedent request and the subsequent promise be implied by law, and there appear to be no clear cases of this until the close of the eighteenth century. Blackstone[7] merely gives the simple statement that money paid at request can be recovered. Two changes

[1] *Exall* v. *Partridge*, 8 T.R. 308, at 310: "It has been said, that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former; but that I deny."

[2] "Performing the part of a servant" is mentioned in *Hayes* v. *Warren*, 2 Barn. K.B. at 141. There is a clear expression of this principle in *Paynter* v. *Williams*, (1833) 1 C. & M. 810.

[3] Cases are collected in notes to *Lampleigh* v. *Brathwait* in Smith, L.C., 13th ed. i. p. 156.

[4] 2 Barn. K.B. at 141. Bail is also mentioned in *Hayes* v. *Warren*; Lord Ellenborough discussed this rule in *Fisher* v. *Fallows*, (1804) 5 Esp. 171, apparently regarding the obligation to indemnity as being a term of a tacit contract.

[5] Buller N.P. 129; the obligation was perhaps not legal as the pauper was resident outside his parish of settlement.

[6] *Atkins* v. *Banwell*, 2 East 505.

[7] Comm. III, 163.

then occurred: claims for money paid lay where there had been some compulsion in the payment, and where a right of contribution existed.

(1) Where the plaintiff has been compelled to pay money which should have been paid by the defendant

Lord Mansfield came near to this rule when he held that where there had been no request express or tacit there could be no recovery of a voluntary payment,[1] but a positive statement as to compulsory payment does not appear until *Exall* v. *Partridge* in 1799.[2] In this case a landlord distraining on premises occupied by the defendants took a carriage of the plaintiff's which was upon the premises, and the plaintiff paid the rent due to redeem his goods. The court decided in favour of the plaintiff on the broad proposition that as the defendants were bound to pay the landlord and as the plaintiff had been compelled to pay "as he could not have relieved himself from the distress without paying the rent", he could recover the amount as money paid. The only disputed point was whether two of the defendants were liable since they had assigned their interest to the third, and the important rule was laid down without discussion or precedent. Lord Tenterden, C.J., stated the rule in 1827 as a "general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by that latter".[3] In fact the rule in *Exall* v. *Partridge* has never been questioned. The question of what constitutes "compulsion" has caused little difficulty; the cases show either redemption of goods[4] or legal process,[5] or threat of legal process,[6] the latter including cases where the threat of proceedings was po-

[1] *Stokes* v. *Lewis*, (1785) 1 T.R. 20. [2] 8 T.R. 308, 3 Esp. 8.

[3] *Pownal* v. *Ferrand*, 6 B. & C. at 443. Similar statements are to be found in most of the cases cited in notes 4–6 below.

[4] *Dawson* v. *Linton*, (1822) 5 B. & Ald. 521; *Johnson* v. *R.M.S.P. Co.*, (1867) L.R. 3 C.P. 38; *Edmunds* v. *Wallingford*, (1885) 14 Q.B.D. 811.

[5] *Pownal* v. *Ferrand*, (1827) 6 B. & C. 439; *Jefferys* v. *Gurr*, (1831) 2 B. & Ad. 833; *Bleaden* v. *Charles*, (1831) 7 Bing. 246.

[6] *Brown* v. *Hodgson*, (1811) 4 Taunt. 189; *Foster* v. *Ley*, (1835) 2 Bing. N.C. 269; *Bate* v. *Payne*, (1849) 13 Q.B. 900; *Grissell* v. *Robinson*, (1836) 3 Bing. N.C. 10 (perhaps better regarded as a tacit contract); *Brittain* v. *Lloyd*, (1845) 14 M. & W. 762.

tential and there would have been no defence to proceedings, but excluding cases where proceedings would have failed.[1] Only one case needs specific attention: in *England* v. *Marsden* (1866)[2] where the plaintiff had left goods solely for his own purposes on the premises of the defendant, and then had to pay rent and expenses when the defendant's landlord distrained, it was held that he could not recover against the defendant. The payment was said not to have been compulsory because the goods were on defendant's premises for the benefit of the plaintiff only, thus distinguishing the case from *Exall* v. *Partridge* (1799).[3] But *England* v. *Marsden* was strongly disapproved in *Edmunds* v. *Wallingford* (1885)[4] and can be taken as no longer good law.

The chief controversy has centred round the question whether it is necessary for the compulsory payment to have discharged the defendant from some liability. This was not discussed in earlier cases. Thus where goods were consigned to *A* and the carrier misdelivered to *B* who kept the goods, it was held that the carrier having paid *A* could recover as for money paid against *B*.[5] It could be said that as the carrier and *B* were both liable in conversion, payment by the carrier vested the property in him and so relieved *B* of liability to *A*. *Bleaden* v. *Charles* (1831)[6] also shows an absence of any clear rule on this point. A bill accepted by the plaintiff as accommodation party was lodged with the defendant as security by a third person *H*; *H* later paid off his indebtedness to the defendant, but the defendant wrongfully negotiated the bill. The holder recovered on the bill against the plaintiff. It was held that the plaintiff could recover against the defendant as money paid to his use: "there was a compulsory payment by the plaintiff, induced by an act of the defendant; an act of which he has the full benefit". Here the defendant was surely liable to the third person in conversion, and that liability was unaffected by the plaintiff's payment. In

[1] *Sleigh* v. *Sleigh*, (1850) 5 Ex. 515, action on a bill would have failed as holder had not given notice of dishonour.

[2] L.R. 1 C.P. 529. [3] 8 T.R. 308, 3 Esp. 8.

[4] 14 Q.B.D. 811, *per* Lindley, C.J., at 816.

[5] *Brown* v. *Hodgson*, (1811) 4 Taunt. 189; but on similar facts in *Sills* v. *Laing*, (1814) 4 Camp. 81, without reference to *Brown* v. *Hodgson*, the plaintiff was non-suited and told that he should have declared specially.

[6] 7 Bing. 246.

Dawson v. *Linton* (1822)[1] an outgoing tenant who had paid money to prevent his stack being distrained upon for a drainage tax was allowed to recover from the landlord, although, as the tax could only be deducted from the rent, the person actually relieved was the incoming tenant. The court obviously treated this as a special case. This was cited for the plaintiff in *Spencer* v. *Parry* (1835),[2] where a landlord who had paid taxes due from him by statute sought to recover the amount as "money paid" from his tenant who had agreed to pay such taxes and had not done so. The court held that the plaintiff should have declared specially; the landlord had merely paid his own debt to the Crown, and his payment did not relieve the tenant of any liability. Following this, Parke, B., ruled in 1838 that an action for money paid would not lie "because the payment of the money does not exonerate the defendant from any liability at all".[3] The precedents were discussed in *Brittain* v. *Lloyd* (1845).[4] An auctioneer who had had to pay excise duty on a sale recovered the amount from his employer as money paid. The defendant relied on the fact that by statute the auctioneer was liable for the duty, and hence the auctioneer did not by paying relieve his employer of any liability. Pollock, C.B., did not accept the proposition that it is necessary for the defendant to have been relieved of some liability; he pointed out that where there is an express request by the defendant it is immaterial whether the payment by the plaintiff relieves the defendant of any liability, and added that relief of the defendant from liability is equally immaterial when the request is implied by law: "The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay and does pay, makes no difference."[5] One difficulty of this judgment is that on the facts of the case the defendant must be taken to have authorised her agent, the plaintiff, to pay all usual outgoings, and the real

[1] 5 B. & Ald. 521. [2] 3 Ad. & E. 331.

[3] *Lubbock* v. *Tribe*, (1838) 3 M. & W. at 614. In *Hunter* v. *Hunt*, (1845) 1 C.B. 300, relief was refused because it did not appear that the defendant benefited by the payment made by the plaintiff.

[4] 14 M. & W. 762. [5] 14 M. & W. at 773.

point for decision was merely whether an agent can seek indemnity by this form of action.[1] Pollock, C.B., also instanced the case of bail to show that money can be recovered "although it is clear that the principal never was in any degree liable to any part of the expense". This seems a confusion between a tacit request and one implied by law. For an express or tacit request clearly it does not matter whether the defendant is relieved of any liability by the payment;[2] for a request implied by law it certainly did matter, but whether it does so to-day depends upon whether *Brittain* v. *Lloyd* would be followed. In considering this point it is material to reconsider *Spencer* v. *Parry*;[3] there can be no doubt that the *ratio decidendi* there was that the defendant was only bound to pay the tax as between himself and the plaintiff, so that when the plaintiff paid he did not relieve the defendant of any liability to any one; the defendant merely broke his contract with the plaintiff. Now Pollock, C.B., dismissed *Spencer* v. *Parry* by saying that there was no implied request, which does not agree with the *ratio decidendi* of that case. There appears to me to be an explanation of this conflict. If we formulate the view of Pollock, C.B., as: "Where there is a request express, tacit, or implied by law, it is immaterial whether the payment relieves the defendant of any liability or not", we still have to decide *when* the law will imply a request. Apart from *Brittain* v. *Lloyd*, which is explicable either as agency or as tacit request, it appears from the cases that a request will not be implied by law except where the payment by the plaintiff has relieved the defendant of some liability. In other words, the formal basis of claims for money paid is a request by the defendant, and relief of the defendant from liability is always immaterial, but the formal basis will not arise by implication of law unless there is a material basis in compulsion coupled with relief of the defendant from some liability.

[1] This view of the case was taken by Blackburn, J., in *Mollett* v. *Robinson*, (1872) L.R. 7 C.P. at 102.

[2] E.g. if money is paid to a third person for no consideration, as in *Knight* v. *Cambers*, (1855) 15 C.B. 562, on a gaming contract, it is recoverable; *aliter* if paid on a stockjobbing contract that is illegal, *Mortimer* v. *Gell*, (1847) 4 C.B. 543.

[3] p. 53 above.

In this form of indebitatus assumpsit as in other forms there has been talk of "privity" being necessary. In *Pownal* v. *Ferrand* (1827)[1] counsel argued that there was no "privity", but all the four judgments ignore the point. In *Bleaden* v. *Charles* (1831)[2] Tindal, C.J., said that there was "privity" between the parties, without explaining what he meant; the other three judgments do not mention it. Difficulty has arisen from *Griffinhoofe* v. *Daubuz* (1855).[3] An outgoing tenant left a stack on the land, and the landlord having failed to pay tithe rent-charge, the Ecclesiastical Commissioners distrained; the tenant having paid the charge sued the landlord for indemnity. It was held that the landlord was not liable. Parke, B., found that as the only allegations were that the farm and land were liable to the charge and that the stack was lawfully on the land, there was not that relation necessary for "money paid"; earlier he had spoken of "privity", saying that it was present in *Exall* v. *Partridge* (1799),[4] but it is impossible to discover what he meant. So far as the decision is concerned, *Griffinhoofe* v. *Daubuz* should be taken as turning on the peculiar nature of commuted tithe.[5] As to "privity", the case has been discredited by *Edmunds* v. *Wallingford* (1885),[6] where Lindley, L.J., expressed doubts as to the meaning of the term, and did not consider "privity" at all necessary for the action. As the notion of "privity" has occurred so few times in these actions, it seems safe to assert that this unintelligible ingredient has never been essential.

(2) Contribution

By the end of the seventeenth century contribution could be enforced in certain cases, either in law or in equity.[7] These cases cover a very wide field, but it is not necessary to trace the development of each type of claim. The typical claim to contribution is that of a surety against his co-surety. In the seventeenth

[1] 6 B. & C. 439.
[2] 7 Bing. 246.
[3] 5 El. & Bl. 746, 25 L.J. Q.B. 237.
[4] 8 T.R. 308, 3 Esp. 8.
[5] In *Attorney-General* v. *Durham*, (1882) 46 L.T. at 19, Hall, V.C., treated the case as an illustration of the effect of Tithe Commutation Act 1836, s. 67, which provides that nothing in the Act shall render any person personally liable for payment.
[6] 14 Q.B.D. 811, at 815.
[7] See sect. 2 above.

century it was necessary to go into Chancery for this relief;[1] actions at common law were restricted to cases where there had been an express promise by a surety to contribute to the sum paid by his co-surety.[2] The most important case in the development of this branch of the law was *Deering* v. *Winchelsea* in 1787.[3] Here the plaintiff and defendants were sureties for the same principal in the same engagement, but were sureties by separate bonds. It was admitted that if the bond had been joint the defendants would have been liable to contribute when the plaintiff paid the whole sum due; in such case of course the liability could be analysed as based on contract, whereas the liability of sureties by separate agreements may well exist where it is not possible to construe a genuine contract between them. The court found for the plaintiff, basing the decision on general principles of equity, comparing the position with general average in maritime law, and expressly stating that it does not depend on contract although contract may qualify the right.[4] Since the case was brought on the equitable jurisdiction of the Court of Exchequer[5] it should be regarded as a development of Chancery practice[6] soon firmly established.[7]

The common law courts very soon allowed indebitatus assumpsit for the enforcement of contribution among sureties. It is a curious development, since the precedent of *Deering* v. *Winchelsea* was really a precedent for equity and not common

[1] *Peter* v. *Rich*, (1629–30) 1 Chanc. Rep. 34; *Morgan* v. *Seymour*, (1637–8) 1 Chanc. Rep. 120.

[2] *Bagg* v. *Slade*, (1616) 1 Roll. Rep. 354, 3 Bulst. 162; also Roll. Ab. 24 pl. 31.

[3] 1 Cox 318, 2 Bos. & Pul. 270.

[4] A good early example of a general right to contribution being qualified by contract is *Hutton* v. *Eyre*, (1815) 6 Taunt. 289.

[5] This is clear, since in both reports we find the court considering the application of the maxim that "a man must come into a Court of Equity with clean hands". Cox's reports are entitled "Cases determined in the Courts of Equity".

[6] Eyre, C.B., in his judgment considers common law instances of contribution, pointing out that the weakness consisted in a clumsy method of enforcement. *Deering* v. *Winchelsea* is taken as the leading case in White and Tudor L.C.

[7] In *Craythorne* v. *Swinburne*, (1807) 14 Ves. Jun. at 164 and 169, and in *Coope* v. *Twynam*, (1823) Turn. & R. at 429, Eldon, L.C., referred to past doubts of his own and of the profession about the decision in *Deering* v. *Winchelsea*, but expressed his approval of the rule.

law; nevertheless that precedent apparently decided *Cowell* v. *Edwards* in 1800,[1] an action for contribution by a surety, where in reply to an objection to the form of action the court "observed that it might now perhaps be found too late to hold that this action could not be maintained at law". The use of indebitatus assumpsit had been impliedly recognised in a case shortly before 1800[2] and was doubtless common practice. Cases soon afterwards show no objection to the form of action,[3] although the novelty of such proceedings at law produced comment from the bench.[4]

The general rule that there can be no contribution between joint tortfeasors appears to be first stated in *Merryweather* v. *Nixan* in 1799.[5] There was practically no authority; according to counsel for the defendant there was only one case where the point had been raised before[6] and there the court (Exchequer Court's equitable jurisdiction) expressed doubts and no decision is reported. The decision in *Merryweather* v. *Nixan* illustrates one of the worst features of English case-law; a principle of considerable importance was laid down by Lord Kenyon, C.J., apparently with little discussion, the decisive factor being that "he had never before heard of such an action being brought". Within a few years Lord Ellenborough twice cited *Merryweather* v. *Nixan* as if it contained a well settled and clear rule,[7] and later cases merely add some qualifications.[8]

[1] Bos. & Pul. 268. The report of *Deering* v. *Winchelsea* in 2 Bos. & Pul. 270 is an appendix to *Cowell* v. *Edwards*.

[2] *Turner* v. *Davies*, (1796) 2 Esp. 478.

[3] *Cole* v. *Saxby*, (1800) 3 Esp. 159; *Brand and Herbert* v. *Boulcott*, (1802) 3 Bos. & Pul. 235; *Dunn* v. *Slee*, (1816) Holt 399.

[4] Lord Eldon in *Craythorne* v. *Swinburne*, (1807) 14 Ves. Jun. at 164 and 169, and Best, J., in *Collins* v. *Prosser*, (1823) 1 B. & C. at 689. In *Wright* v. *Hunter*, (1800) 5 Ves. Jun. 792, 1 East 20, a case of contribution between partners, the Chancery Court thought it necessary to point out that Chancery jurisdiction had not been ousted.

[5] 8 T.R. 186.

[6] *Philips* v. *Biggs*, (1659) Hardres, 164. In *Adamson* v. *Jarvis*, (1827) 4 Bing. 66 at 72, Best, C.J., mentioned the case of *Walton* v. *Hanbury*, (1707) 2 Vern. 591, but considered that it was impossible to get at the principle of the decision.

[7] *Farebrother* v. *Ansley*, (1808) 1 Camp. at 345; *Wilson* v. *Milner*, (1810) 2 Camp. at 453. The rule was stated in Chancery, with no case reference, in *Lingard* v. *Bromley*, (1812) 1 V. & B. 114.

[8] Salmond, *Torts*, 8th ed. p. 86. The rule is virtually abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935.

SECTION 21

Recovery of Money paid by Mistake

In the earlier cases of recovery of money paid by mistake no distinction was drawn between mutual mistake and mistake induced by the wrongful act of the defendant.[1] The first case where indebitatus assumpsit was used to recover money paid by mistake was perhaps *Bonnel* v. *Foulke* (1657).[2] In this case the plaintiff owed rent for an office of the City of London, and on demand being made by the Mayor he paid it to the Mayor whereas it was due to the City Chamberlain, to whom the plaintiff had to pay again; the plaintiff recovered from the Mayor, but the report does not show whether the money was paid through mistake or because of compulsion on a demand *colore officii*. Mistake by the payer and fraud in the receiver are mentioned together in 1693 as well-established cases in which money can be recovered.[3] Mistake by a person paying does not cease to be a mistake because it has been induced by misrepresentations, innocent or fraudulent, of the payee. In *Attorney-General* v. *Perry* (1733)[4] the court said: "Whenever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under colour, or upon an apprehension, though a mistaken apprehension of having good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver." Where fraud has induced a mistake under which money has been paid there seems no reason why recovery should not rest on mistake as well as on waiver of deceit; this must be distinguished from fraud inducing a contract (but not creating operative mistake), for there the money

[1] *Hewer* v. *Bartholomew*, (1598) Cro. Eliz. 614; *Cavendish* v. *Middleton*, (1628) Cro. Car. 141, W. Jo. 196, where there was fraud which induced the mistake, but the court said account would lie.

[2] 2 Sid. 4. Ames, *Lectures*, 163, and Street, III, 190, treat this case as resting on mistake.

[3] *Tomkins* v. *Bernet*, Salk. 22, Skin. 412.

[4] 2 Comyns Rep. 481, at p. 491.

would be paid on a contract that is voidable, and special rules apply.[1]

There is little early authority on the scope of mistake. In *Farmer* v. *Arundel* (1772),[2] De Grey, C.J., said: "When money is paid by one man to another on a mistake of fact or of law, or by deceit, this action [money had and received] will certainly lie." In *Buller* v. *Harrison* (1777)[3] an insurance claim was paid to assured's agent, and on discovery that the money was not due, indebitatus assumpsit was brought against the agent; it was assumed that the money could be recovered, the only point discussed being whether the agent was personally liable. In another case[4] where a bankrupt owed money to the plaintiff and the plaintiff owed money to the bankrupt, the plaintiff by mistake paid his debt to the assignees without setting off the debt due to him, it was held that he could recover. Lord Mansfield said that "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again...[such as a statute-barred debt]....But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again."

The line of cases which exclude mistake of law as a ground for recovery begins with *Lowry* v. *Bourdieu* in 1780.[5] This was an action for recovery of an insurance premium after the voyage was over on a policy where there was no insurable interest. The plaintiff had made the insurance in the belief that he was entitled to do so, and his counsel argued that as he had paid the premium under a mistake of law, and not with intention to break the law, he should recover as on a payment without consideration. The claim failed. Lord Mansfield based his decision on the fact that it was an illegal contract, and that the parties were *in pari delicto*. Willes, J., dissented because there was mistake. Buller, J., held for the defendant chiefly because it was an executed illegal contract, but he also expressed the view that there was no mistake of fact, and that "if the law was mistaken, the rule applies, that *ignorantia juris non excusat*".

[1] See p. 84 below. [2] 2 W. Bl. 824. [3] 2 Cowp. 565.
[4] *Bize* v. *Dickason*, (1786) 1 T.R. 285. [5] 2 Doug. 468.

In *Bilbie* v. *Lumley* (1802)[1] material facts had been withheld from underwriters, but disclosed later, and the underwriters not appreciating that they could have repudiated liability paid the claim; an action was then brought to recover the amount paid. There was no proper discussion of the effect of mistake of law. Lord Ellenborough asked counsel if he knew of any case where money paid voluntarily with full knowledge of the facts had ever been recovered on the ground of mistake of law, and as no such case was cited, his lordship mentioned an inconclusive case[2] and added: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried", referring to Buller, J.'s quotation of *ignorantia juris non excusat* in *Lowry* v. *Bourdieu*.[3] This rule was upheld in *Brisbane* v. *Dacres* (1813).[4] The plaintiff, a naval captain, sought to recover from his admiral's executrix a sum representing one-third of freights earned by the plaintiff in carrying public and private treasure in a king's ship; the plaintiff had paid this sum to his admiral according to a naval custom. Another case had settled that the custom was not binding, and the carriage of the private treasure was illegal. The court was unanimous that he could not recover any portion of freight on the private treasure, for the transaction was illegal. As to the public treasure, the court found for the defendant, with one dissenting opinion. Gibbs, C.J., reviewed precedents and concluded: "Our only question, then, in all cases was, whether the facts were known; this was the universal practice, till *Bilbie* v. *Lumley* occurred....Now this was a direct decision upon the point, certainly without argument; but the counsel, whose learning we all know, and who was never forward to give up a case which he thought he could support, abandoned it.... I think on principle that money which is paid to a man who claims it as his right, with a full knowledge of the facts, cannot be recovered back."[5] Heath, J., and Mansfield, C.J., also held for the defendant, the latter saying that *Bilbie* v. *Lumley* was an express authority which the court did not feel inclined to over-

[1] 2 East 469. [2] *Chatfield* v. *Paxton*, note to 2 East 471.
[3] (1780) 2 Doug. 468, discussed above. [4] 5 Taunt. 143.
[5] At p. 157.

rule. Chambre, J., dissented, holding that the maxim *ignorantia juris non excusat* was irrelevant in the cases where it had been cited; his objection was not to the use of maxims; but to the use of the wrong maxim.[1] The court was influenced by the idea that payment of money demanded as of right is analogous to the compromise of a claim[2] and since this topic has been in a confused state the analogy has been far from helpful.

Some elaboration of these doctrines has taken place since the main rule was finally settled in *Brisbane* v. *Dacres*, but discussion of them is beyond our scope.[3]

SECTION 22

Indebitatus assumpsit against a wrongdoer

We have seen in sect. 4 above that a wrongdoer could sometimes be charged in account, but that if the wrong amounted to a disseisin or its equivalent in the case of goods the action had to be in tort. In the latter part of the seventeenth century there are cases where the plaintiff was allowed to waive the tort and sue on indebitatus assumpsit.[4] The developments in this direction cover a considerable field, and it is more convenient to consider them under sub-headings.

(1) CASES WHERE THE DEFENDANT HAS WRONGFULLY OBTAINED FROM A THIRD PERSON MONEY DUE FROM THE THIRD PERSON TO THE PLAINTIFF

Many cases have arisen where the defendant has usurped an office to which the plaintiff was entitled and received the fees. The earliest examples of waiver of tort deal with such cases. The early conception of an office, as of much incorporeal property,

[1] Chambre liked maxims, and thought that *Bilbie* v. *Lumley* should be dismissed with *volenti non fit injuria* and *Lowry* v. *Bourdieu* with *in pari delicto potior est conditio defendentis*.

[2] Heath, J., cited *Marriott* v. *Hampton*, (1797) 7 T.R. 269, considering the plaintiff in the case before him as having been a judge in his own cause when he decided to pay. Chambre, J., dissented partly on the ground that he did not find that any demand was ever made of the plaintiff which he thought it better to pay than litigate.

[3] Many cases are noted in Smith, L.C., in the notes to *Marriott* v. *Hampton*.

[4] H.E.L. VIII, 94–5, traces this development down to 1706.

was that of a thing granted just as freeholds were granted; the holder of the office has the estates of a freeholder and the remedies of a freeholder. The early remedy for disturbance of office was an assize of novel disseisin, in which the office could be recovered with the profits.[1] Assize, long obsolete for recovery of land, was still used for recovery of offices in the later seventeenth century.[2] Action on the case for disturbance of office was well established in 1610;[3] it would lie against a usurper for the profits.[4] Hence indebitatus assumpsit must be regarded as a substituted action, by waiver of tort. The first case where indebitatus assumpsit was used to recover profits wrongfully received by the defendant was *Woodward* v. *Aston* (1672),[5] where the defendant had received all the profits of an office held by himself and the plaintiff; the argument turned on whether the office was joint or not, and the form of action was not discussed. In *Arris* v. *Stukely* (1677),[6] an action against a usurper of office, it was argued for the defendant that indebitatus assumpsit would not lie where there was a disseisin; the plaintiff asserted that "where one receives my rent, I may charge him as bailiff or receiver...by reason of the money [received] the law creates a promise; and the action is not founded on the tort, but on the receipt of the profits". The court considered that "indebitatus assumpsit will lie for rents received by one who pretends a title; for in such case an account will lie. Wherever the plaintiff may have an account, an indebitatus will lie". In the next case on this matter, *Howard* v. *Wood* (1679),[7] the defendant again relied on the old learning as to wrongful receipt of rents, but the court found for the plaintiff, considering that in view of previous decisions "it would be hard now to adjudge the contrary".

It seems that this form of action was allowed on the supposi-

[1] The assize should be brought "of the office, cum pertinentiis; for if his plaint be of the office, and of the profits thereof, he makes his claim of one thing twice, and thereof his plaint shall abate", Hale's notes to F.N.B. 179.

[2] *Cragg* v. *Norfolk*, (1674) 2 Lev. 108, 120.

[3] *Earl of Shrewsbury's Case*, 9 Co. Rep. 46 b at 51 a.

[4] *Mountague* v. *Preston*, (1690) 2 Vent. 170.

[5] 2 Mod. 95, 1 Vent. 296, Freeman 429. [6] 2 Mod. 260.

[7] 2 Lev. 245, 2 Show. K.B. 21, Freeman 478; claim for fees of court baron and court leet taken by the defendant when the plaintiff had a grant of such fees.

tion that account could have been brought. The analogy of a wrongful collector of rents was not a good one; the law there was affected by the fact that a tenant who pays to the wrong person will have to pay again to the right person, whereas one who pays dues to an officer *de facto* is generally discharged from further payment,[1] so that the rightful officer must recover from the usurper if he is to recover at all. This latter consideration probably lay behind the readiness of the courts to extend a convenient remedy in such cases. After *Howard* v. *Wood*[2] indebitatus assumpsit was the usual remedy for recovery of money received by the usurper of an office;[3] and by 1703 it appears as a normal method of trying the defendant's title to the office he has exercised.[4] In such an action the plaintiff can recover only money received by the defendant as fees or payments made as due to the holder of that office; gratuities received by the defendant are not recoverable.[5]

There are cases other than usurpation of an office which come under this heading; some of these cases are hardly waiver of tort. In *Jacob* v. *Allen* (1703)[6] one *H*, having letters of administration, made the defendant his attorney to receive money owing to the deceased. The defendant received money from debtors of the estate and paid it to *H*. Then a will was found, and the plaintiff as executor sued the defendant for money received to the plaintiff's use. The court held that there was an "implied contract", and the defendant was liable.[7] As regards the debtors of the estate who had paid money to the defendant, they paid under compulsion of a void authority and their debts to deceased would not have been discharged.[8] The plaintiff by holding the defendant liable (or suing the executor as he would have to do in later law) adopted the acts of the defendant, as he would do in waiver of tort, yet it is difficult to see how the plaintiff could

[1] See Viner Ab. XVI, 114.
[2] See p. 62, n. 7.
[3] E.g. *Bowell* v. *Milbank*, (1772) 1 T.R. 399.
[4] *Rains* v. *Commissary of Diocese of Canterbury*, 7 Mod. 146.
[5] *Boyter* v. *Dodsworth*, (1796) 6 T.R. 681.
[6] Salk. 27.
[7] In so far as this case is authority for an agent being liable when he has acted *bona fide* and accounted to his principal, it is overruled by later decisions; see p. 114 below.
[8] *Anon*, (1706) 1 Comyn Rep. 150, a doctrine questioned in *Allen* v. *Dundas*, (1789) 3 T.R. 125, see p. 67, n. 1 below.

have framed an action in tort against the defendant. The true basis of liability is estoppel; the defendant (the executor in later law) having received money for the estate of the deceased cannot deny that the money forms part of that estate. In *Asher* v. *Wallis* (1707)[1] the defendant had, during the life of his wife, contracted a bigamous marriage with the plaintiff who was innocent of the true state of affairs. The defendant collected rents from the lands of the plaintiff. It was held that the plaintiff could recover the amount of the rents by indebitatus assumpsit; Holt, C.J., said: "Trover would not lie in this case because she was never possessed of the monies. By her marriage she consented the man should manage her estate; if he was her husband, then he received the money to his own use; but if not, then to her use."[2] Presumably deceit would not lie, since the defendant had not obtained any property belonging to the plaintiff, and a claim for disseisin by election presents difficulties. If the case is to be treated as waiver of tort we must perform the ridiculous task of finding a possible claim in tort in order to waive it; on any broad statement of liability there can be no doubt that the defendant should refund.

(2) Cases where the defendant has wrongfully compelled the plaintiff to pay money that was not due

Money obtained by compulsion is generally obtained by a tortious act on the defendant's part, and an action for recovery of the money may be regarded as waiver of tort. It is better to give the matter a separate heading, for two reasons. First, at the time when some of these claims were recognised it is not clear that the plaintiff could have claimed in tort as the law of tort was not settled. Second, in a few cases it appears that no tort was committed.

The first clear case of indebitatus assumpsit for recovery of money paid by compulsion was in 1694,[3] where money had been

[1] 11 Mod. 146, S.C. *Hasser* v. *Wallis*, Salk. 28, S.C. *Asser* v. *Wilks*, Holt K.B. 36.

[2] Holt K.B. 37.

[3] *Newdigate* v. *Davy*, 1 Ld. Raym. 742. *Bonnel* v. *Foulke*, (1657) 2 Sid. 4, may have been a case of compulsion; see p. 58 above.

paid by the plaintiff to the defendant under a sentence of James II's illegal Court of High Commission. In 1697 Holt, C.J., recognised that fees paid when they were not due could be recovered by this action.[1] "Compulsion" has been used to signify a state of affairs where the plaintiff has paid money because he could not otherwise exercise his legal rights; it excludes a taking of money which would amount to trespass. In *Astley* v. *Reynolds* (1731)[2] a pawnee refused to give up goods pawned unless the pawnor paid a sum in excess of the interest due; the pawnor paid, and brought indebitatus assumpsit to recover the excessive charge; the court held that the action would well lie, for it was a payment by compulsion, and the plaintiff might have such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will.

The payment must not be "voluntary"; this is simply the converse of compulsion. As the court pointed out in *Astley* v. *Reynolds*, money paid voluntarily can be recovered if it was paid by mistake or deceit, but not otherwise. Where money has been paid voluntarily "it must be taken to be properly and legally paid."[3] In *Morgan* v. *Palmer* (1824)[4] Abbott, C.J., said: "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose', no person can contend that they stand upon anything like an equal footing."

Apart from certain exceptions considered below, the proposition that money obtained by compulsion can be recovered has

[1] *Anon*, Comb. 447.

[2] 2 Strange 915.

[3] *Cartwright* v. *Rowley*, (1799) 2 Esp. 723, *per* Lord Kenyon, C.J., discussing an unreported case of compulsion.

[4] 2 B. & C. 729 at 734. *Per* Lord Kenyon in *Fulham* v. *Down*, (1798) 6 Esp. 26, a payment is not voluntary where there is "immediate and urgent necessity" to pay an illegal demand.

remained unquestioned.[1] It should be noted that our courts may regard an act as compulsion when the act was legal in the country where it took place.[2]

Where the plaintiff has through compulsion entered into an illegal contract with the defendant, and has paid money to the defendant under that contract, the plaintiff can recover what he has paid. Such cases are discussed in sect. 25.

Where the compulsion was the act of an agent the agent is personally liable; see sect. 29.

Money paid under process of law and money paid to avoid distress require special treatment.

(i) *Money paid under process of law.*[3] It is an old principle of our law that a judgment is conclusive between the parties. A judgment could not be disputed except in proceedings to reverse it in a higher court, or within the limits of supersedeas and audita querela (replaced by procedure on motion in the eighteenth century).[4] This doctrine is limited to cases where the judgment was of a court having jurisdiction; if the court

[1] *Attorney-General* v. *Perry*, (1733) 2 Com. Rep. at 490. *Irving* v. *Wilson*, (1791) 4 T.R. 485, money paid for release of goods wrongfully held by revenue officer. *Greenway* v. *Hurd*, (1792) 4 T.R. 553, duties paid to excise officer when not due (decided for defendant on other grounds). *Parsons* v. *Blandy*, (1810) Wight. 22, excess turnpike tolls. *Umphelby* v. *M'Lean*, (1817) 1 B. & Ald. 42, excessive charges by a collector on distress for arrears of taxes. *Dew* v. *Parsons*, (1819) 2 B. & Ald. 562, sheriff taking larger fees than he was entitled to. *Parker* v. *G.W.R.*, (1844) 7 M. & G. 253, railway company refusing to carry goods except for charges in excess of statutory provisions; this was regarded as the leading case in many subsequent decisions. *Close* v. *Phipps*, (1844) 7 M. & G. 586, money paid beyond redemption money by mortgagor to mortgagee to avoid sale by mortgagee; this mortgagee's right to sell was absolute at law, the right to redeem being equitable. *Wakefield* v. *Newbon*, (1844) 6 Q.B. 276, money paid by mortgagor to recover his deeds, when he has paid off the mortgage, to attorney who wrongfully claimed a lien on them. *Parker* v. *Bristol and Exeter Ry. Co.*, (1851) 6 Exch. 702, railway charges in excess of prescribed scale. *Owen* v. *Cronk*, [1895] 1 Q.B. 265 C.A., plaintiff's goods held by defendant until plaintiff paid excessive charges for work done on the goods.

[2] *Kaufman* v. *Gerson*, [1904] 1 K.B. 591. 73 L.J., K.B. 320; *Société des Hôtels Réunis* v. *Hawker*, (1913) 29 T.L.R. 578.

[3] Smith, L.C., in the notes to *Marriott* v. *Hampton*, contains all the cases of importance for stating the modern law. Here I trace the establishment of the main principle.

[4] There might be a bill in equity asking for a new trial; see *Equity Cases Abridged*, chap. 52, where late seventeenth-century cases are cited; this practice died out during the eighteenth century.

had no jurisdiction then money paid under its orders could be recovered by original action.[1] The first attempt to recover by original action money paid under a judgment seems to be *Mead* v. *Death* (1700),[2] where indebitatus assumpsit was brought to recover money paid under an order of Quarter Sessions when that order had been quashed on certiorari in the King's Bench. It was held that the action would not lie, as it would not lie to recover money paid on a judgment reversed for error. The appropriate procedure was an order of the superior court on a writ of restitution of profits taken *colore judicii praedict.* In *Feltham* v. *Terry* (1773),[3] where an overseer of the poor levied moneys on a conviction of a churchwarden, and the conviction having been set aside, the court held that the churchwarden could recover from the overseer moneys still in his hands. The overseer received the money to apply for poor-law purposes, and had misappropriated it. The case was considered as waiver of trover or trespass. It is very badly reported. In *Farrow* v. *Mayes* (1852)[4] the court took it for granted that money paid under a judgment which had become void could be recovered.

In cases where the judgment was still in force the law was for a time unsettled by *Moses* v. *Macferlan* (1760).[5] This case has been so often cited on the scope of actions for money had and received that it is important to distinguish between the general doctrines enunciated and the actual decision; I here refer to the actual decision. Macferlan had sued Moses in a Court of Conscience on notes endorsed by Moses, the endorsement having been given on an agreement between Macferlan and Moses that Moses should not be liable. The Court of Conscience considered that it had no power to judge of that agreement, and found for Macferlan on the endorsement. Moses paid on the judgment

[1] *Newdigate* v. *Davy*, (1694) 1 Ld. Raym. 742, noted at p. 64 above. In *Allen* v. *Dundas*, (1789) 3 T.R. 125, probate of a forged will is valid until set aside, for it is a judgment within the court's jurisdiction, and payments by debtors of the estate to the executor under such will discharge the payer; probate of a will when testator is still alive would not have this effect, for then there would be no jurisdiction.

[2] 1 Ld. Raym. 742. It was said by the Court of Chancery in *Barbone* v. *Brent*, (1683) 1 Vern. 176, that if *A* owes money to *B* and pays part to *B*, and then *B* sues and recovers the whole, that *A* could succeed at law against *B* for money received to *A*'s use.

[3] Lofft 207. [4] 18 Q.B. 516. [5] 2 Burr. 1005.

and also on other notes where actions were pending, and brought indebitatus assumpsit to recover. Lord Mansfield held for the plaintiff, agreeing that "the merits of a judgment can never be over-haled by an original suit, either in law or in equity", but finding a distinction between a judgment and the grounds of the action. This decision was severely criticised by Eyre, C.J., in *Phillips* v. *Hunter* (1795)[1] where he said of *Moses* v. *Macferlan*: "I cannot subscribe to the authority of that case...I believe that judgment did not satisfy Westminster Hall at the time; I never could subscribe to it; it seemed to me to unsettle foundations. I can imagine but one case, in which money recovered by one man shall be money had and received to the use of another. I mean the case of an attorney or agent, who may sue in his own name." In *Cobden* v. *Kendrick* (1791),[2] *K* had brought a groundless action against *C*, which *C* compromised; *C* then sued *K* for return of the money he had paid. It was objected that this would put the same sum in litigation a second time, but Lord Kenyon overruled the objection on the ground that the money had been paid under a compromise, and not under the order of a court. The proposition, impliedly recognised here, that a judgment cannot be questioned by original action, has not been questioned in subsequent cases, and although there is no authority for saying that it is an absolute rule there are no cases establishing any exceptions.

Payment may be made in the course of an action, but not under any order of the court. In *Brown* v. *M'Kinally* (1795),[3] *M* had delivered goods to *B* under a contract; *B*, alleging that the goods were defective, refused to pay for them, whereupon *M* sued *B* for the purchase price; *B* paid the price to *M*, asserting that he did so without prejudice and would seek to recover it. In an action by *B* against *M* it was held that *B* could not recover, on the general ground that such actions would lead to matters being tried twice; no authority was cited. In *Marriott* v. *Hampton* (1797),[4] the plaintiff had in the past bought goods,

[1] 2 H.Bl. 402, an action in which the assignees of a bankrupt recovered from creditors money received by the creditors on an attachment of a debt under a decree of a foreign court.

[2] 4 T.R. 431. [3] 1 Esp. 279.

[4] 7 T.R. 269. Spelt *Marriot* in Smith, L.C., 4 R.R. 439, 101 E.R. 969.

paid for them, lost the receipt, been sued for the price, and paid it again; he subsequently found the receipt, and in this action (indebitatus assumpsit for money had and received) sought to make the defendant refund money paid in the former suit. "Lord Kenyon was of opinion at the trial that after money had been paid under legal process, it could not be recovered back again however unconscientiously retained by the defendant, though the case of *Moses* v. *Macferlan* was referred to." The question came before a full court, and Lord Kenyon, C.J., Grose, J., and Lawrence, J., agreed that the claim must be rejected, on the ground stated by Lord Kenyon: "After a recovery by process of law there must be an end of litigation."

A distinction must be made between the compromise of an action and the payment of a claim. In the former the defendant promises to pay a sum in consideration of the plaintiff forgoing his right of action; it is a contract, with the ordinary incidents of contract, and money paid is paid under the contract and not by compulsion of legal process. If the plaintiff pays the whole sum demanded, because he does not wish to face litigation, this is not construed as a contract; we start with the proposition that money paid under compulsion can be recovered, and that an action is compulsion, and then proceed to make an exception for legal process, and an exception to that exception in the case of fraud (discussed in the next paragraph). In both *Brown* v. *M'Kinally*[1] and *Marriott* v. *Hampton*[2] the former action had not reached judgment and as the whole claim was paid there could be no question of any compromise. In *Cobden* v. *Kendrick*[3] only part of the claim in the former action was paid, a warrant of attorney to confess judgment being given for the residue, and action for recovery was brought before the residue became payable. It is possible to regard *Cobden* v. *Kendrick* as a case of compromise or of payment of a claim. If the former view is taken, then the case has nothing to do with compulsion; on the latter view there is apparent conflict with *Brown* v. *M'Kinally* and *Marriott* v. *Hampton*, and unless *Cobden* v. *Kendrick* is regarded as turning on the fraud of the defendant it must be

[1] (1795) 1 Esp. 279.
[2] (1791) 7 T.R. 269.
[3] (1791) 4 T.R. 431.

regarded as having been overruled.[1] We can thus take *Brown* v. *M'Kinally* and *Marriott* v. *Hampton* as establishing the rule that money paid by process of law is irrecoverable by original action, and that "process of law" covers all stages of an action.

It is necessary to make a distinction between money paid on an order of the Court, and money paid on other legal process, since in the latter case the rule against recovery is not absolute. Holroyd, J., in *Milnes* v. *Duncan* (1827),[2] assumed that if money was paid after proceedings were commenced it could not be recovered unless there was fraud in the defendant. This view is expressed clearly by Tindal, C.J., in *Hamlet* v. *Richardson* (1833),[3] where, after a useful review of precedents, he said: "...as the money was paid in this case after the suing out process to recover it, the Defendants in the former action knowing the cause of action for which the writ was sued out before they paid the money, and there being no fraud on the part of the Plaintiff in that action, it appears to us, that no action is maintainable to recover it back". A certain amount of confusion has arisen because it is not clear that money paid to prevent an action continuing is really paid under compulsion, since the law does not regard litigation as an evil which a man may seek to avoid even when he has a sound case. It is obvious in the extract from *Hamlet* v. *Richardson* cited above that Tindal, C.J., was as much influenced by the fact that when the money was paid the payer knew what he was about, as by the fact that it was paid after action brought. This is also shown by the persistency with which counsel cited *Brisbane* v. *Dacres* (1813)[4] on behalf of defendants who were being sued for the return of money paid under legal process. It may be inconsistent to urge as a defence that the money was paid under legal process and that it was paid voluntarily, but common law does not require different formulations of a claim to be consistent.[5] It is probable that the rule that

[1] Tindal, C.J., in *Hamlet* v. *Richardson*, (1833) 9 Bing. 647, said that *Cobden* v. *Kendrick* could be supported only on the ground of fraud in the defendant. If it was a compromise, the defendant's fraud would equally have allowed the plaintiff to succeed.

[2] 6 B. & C. 671 at 679. [3] 9 Bing. 644 at 647. [4] 5 Taunt. 143.

[5] In Smith, L.C., the notes to *Marriott* v. *Hampton* cover the rules as to payment under legal process and also voluntary payments, including the scope of payment by mistake.

fraud in the recipient makes an otherwise "voluntary" payment "involuntary" so that it can be recovered, largely influenced the courts in applying a similar rule to payments under legal process.

(ii) *Money paid to avoid distress.* When a distress was made without any right to distrain, the old remedy was replevin; trespass became an alternative action in 1441, and trover in 1611.[1] For an excessive distress the remedy was replevin or action under the Statute of Marlbridge 52 Hen. III, c. 4.

In *Lindon* v. *Hooper* (1776)[2] it was held that money paid to get the release of cattle wrongfully distrained damage feasant could not be recovered in an action for money had and received, because that form of action would be burdensome to the defendant who would not know the real nature of the plaintiff's claim. In *Knibbs* v. *Hall* (1794)[3] it was held that money paid to avoid an excessive distress for rent could not be recovered as money had and received. "Lord Kenyon was of opinion that this could not be deemed a payment by compulsion, as the defendant might have by a replevin defended himself against the distress; that therefore after a voluntary payment so made, that he should not be allowed to dispute its legality." *Lindon* v. *Hooper* was followed in *Gulliver* v. *Cosens* (1845).[4] It was decided in *Green* v. *Duckett* (1883)[5] that where animals are impounded damage feasant in a private pound that excessive money paid for their release can be recovered by action for money had and received. The case was distinguished from *Lindon* v. *Hooper*[2] because of the nature of the pound: "There is a distinction between a common and a private pound. For when beasts are placed in a common pound the owner knows where it is, and can go and offer to pay there."[6] Denman, J., said: "I should be prepared, independently of the cases already decided, to hold that where there is the element of pure extortion which clearly exists here, in impounding and keeping the animal without a colour of right to the sum demanded, the law would not at the

[1] H.E.L. III, 283–6.
[2] Cowp. 414.
[3] 1 Esp. 84.
[4] 1 C.B. 788.
[5] 11 Q.B.D. 275.
[6] Counsel's argument, at p. 277. The judgment of Hawkins, J., at p. 280, shows that this was the *ratio decidendi*.

present day leave the plaintiff to replevy as his only remedy."[1] The authorities were reviewed in 1915 by the Court of Appeal[2] when an action was brought to recover tolls exacted under a threat of distress. The court held that the money was recoverable as money had and received, the payment having been made under compulsion. The cases cited above to the effect that such action would not lie were not expressly overruled, since the court found that in those cases there was excessive distress whereas in the case before the court there was no right to levy any distress. But the court pointed out that those cases really turned upon procedure and forms of action now abolished.[3] There can be little doubt that the matter is now governed by the ordinary rules as to compulsion.

(3) Waiver of conversion, deceit, and trespass

In *Howard* v. *Wood* (1679) the plaintiff succeeded in indebitatus assumpsit against the defendant who had by usurping the plaintiff's office wrongfully received money due from third persons to the plaintiff;[4] the wrongful act was not conversion, for conversion is a wrong against goods. Disturbance of office and conversion are much alike, and the case contains dicta to the effect that indebitatus assumpsit would not lie against a defendant who had committed conversion.[5] Presumably the objection to waiving conversion appeared to lose its point after the decision in *Howard* v. *Wood*;[4] in fact the rule that disturbance

[1] At p. 279. [2] *Maskell* v. *Horner*, [1915] 3 K.B. 106.

[3] Where the defendant could not be surprised by the plaintiff raising an issue of title to land or other matter requiring pleading at length, no difficulty seems to have arisen. In *Snowdon* v. *Davis*, (1808) 1 Taunt. 359, a bailiff received money from a plaintiff to avoid a distress which would have been illegal as not within the bailiff's authority; in an action to recover as money had and received no objection was taken to the form of action.

[4] Freeman 478, 2 Lev. 245, 2 Show. K.B. 21. See pp. 61–63 above for usurpation of office.

[5] *Per* Scroggs, C.J., in Freeman at p. 479. Holt, C.J.'s, objection in *Anon*, (1697) Comb. 447, to allowing indebitatus assumpsit "where one sells goods that were not his own" is not clear because of the context. In *Phillips* v. *Thompson*, (1675) 3 Lev. 191, where a debtor's property was sold under *fi. fa.* and the proceeds handed to the creditor, the debtor being bankrupt, the assignees of the bankrupt could not recover against the creditor in assumpsit because the Commissioners could only assign the bankrupt's property and money.

of office could be waived became the decisive argument for allowing waiver of detinue or trover in *Lamine* v. *Dorrell* in 1705.[1] In this case the defendant, acting as administrator under a grant of administration subsequently revoked, sold some debentures forming part of the estate of the deceased; the plaintiff as rightful executor recovered the proceeds from the defendant by indebitatus assumpsit for money had and received. Powell, J., after pointing out that detinue or trover would lie, added: "It is hard to turn that into a contract, and against the reason of assumpsits. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use. It has been carried thus far already." He considered *Howard* v. *Wood*[2] as a precedent for this. Holt, C.J., referred to the doubts raised by *Woodward* v. *Aston* (1672)[3] and then pointed out that account would lie against one who entered as guardian in socage when he was not rightful guardian, and that indebitatus assumpsit would be a bar to a subsequent action in trover: "So the defendant in this case, pretending to receive the money the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator." He later said that "he could not see how it differed from an indebitatus assumpsit for the profits of an office by a rightful officer against a wrongful, as money had and received by the wrongful officer to the use of the rightful".[4] The principle of waiver of trover was treated as well settled law in *Thomas* v. *Whip* (1715),[5] and has since been applied in many cases.[6]

The tort of deceit, in the modern sense of a false and fraudulent statement causing damage to another whether or not

[1] 2 Ld. Raym. 1216.

[2] See p. 72 note 4 above.

[3] 2 Mod. 95, 1 Vent. 296, Freeman 429; the doubts do not appear in the reports; Holt undoubtedly meant the doubts that had arisen on the whole topic of waiver of disturbance of office.

[4] 2 Ld. Raym. 1217.

[5] Buller, N.P. 130.

[6] Some earlier cases are: *Hitchin* v. *Campbell*, (1771) W. Bl. 827; *Feltham* v. *Terry*, (1773) Lofft 207; *Hambly* v. *Trott*, (1776) 1 Cowp. 371; *Longchamp* v. *Kenny*, (1779) 1 Doug. 138; *Smith* v. *Hodson*, (1791) 4 T.R. 211; *Bennett* v. *Francis*, (1801) 2 Bos. & Pul. 550. In *Marsh* v. *Keating*, (1834) 1 Bing. N.C. 198, the House of Lords assumed that the law was well settled.

there was any contractual relation between the deceiver and the person deceived, was established by *Pasley* v. *Freeman* in 1789.[1] Obviously waiver of deceit could not arise until the tort of deceit was established. But there are some earlier cases which discuss recovery of money obtained by deceit, and these should perhaps be considered as the historical prelude to waiver of deceit rather than as a stage in the development of the tort itself, since the plaintiffs sought recovery of what was paid and not the unliquidated damages associated with tort. Dicta in *Tomkins* v. *Bernet* (1693)[2] say that money can be recovered if it was obtained by deceit, but in *Dewberry* v. *Chapman* (1696)[3] Holt, C.J., considered that since the defendant had cheated the plaintiff out of his money indebitatus assumpsit would not lie. In *Astley* v. *Reynolds* (1731)[4] the court said there was no doubt that indebitatus assumpsit lay for money obtained by deceit, and a similar assumption was made in *Attorney-General* v. *Perry* (1733).[5] In *Hogan* v. *Shee* (1797)[6] the plaintiff had paid £100 to the defendant, the defendant representing that he could exert influence to obtain a position in the East India Company for the plaintiff's brother, on the terms that the money was to be repaid in three months if the position was not secured. The plaintiff found that the defendant's representation was false, and sued for return of the money paid without waiting for the three months to expire, but the court treated the case more as discharge of contract than as waiver of deceit. *Madden* v. *Kempster* (1807)[7] shows that money obtained by a misrepresentation independent of any contract can be recovered by action for money had and received. In *Hill* v. *Perrott* (1810),[8] *A* by fraud induced *B* to sell goods to *C* an insolvent person, who handed the goods to *A*. *B* brought

[1] 3 T.R. 51. Before this case deceit was an independent tort only in the sense of swindling a court of justice or the like; H.E.L. II, 366; III, 407; VIII, 426.

[2] Salk. 22, Skin. 412; attributed to Treby, C.J., in former, and to Holt, C.J., in the latter.

[3] Holt, K.B. 35, Comb. 341; the defendant took the plaintiff's son as an apprentice, receiving £30 to teach him and to make him a freeman of London, which the defendant could not do as he was not himself a freeman.

[4] 2 Str. 915.

[5] 2 Com. Rep. 481, at 490, money obtained by compulsion may be also obtained by fraud if the receiver has pretended authority where he had none.

[6] 2 Esp. 522. [7] 1 Camp. 12. [8] 3 Taunt. 274.

indebitatus assumpsit against *A*, the count being for goods sold by *B* to *A*; the court held for the plaintiff, treating *A* as estopped from denying that he had bought the goods from *B*. In a similar case in 1820[1] the count was for money had and received, which has remained the form of stating such a claim.[2]

There are relatively few cases dealing with waiver of trespass to land. Waiver has no application to actions of trespass brought to establish rights and actions for exemplary damages. Where substantial damages are sought the complaint is likely to take one of two forms. First: the defendant has been in wrongful occupation of the plaintiff's land. This cannot be waived; Ames[3] has explained why assumpsit would not lie for use and occupation against a trespasser. If the relation of landlord and tenant could be inferred from the facts, then assumpsit for use and occupation would lie, but if ejectment was brought that was electing to treat the defendant as a trespasser, and he could only be charged in assumpsit up to the date of the demise on which ejectment was brought.[4] Second: the defendant has by his trespass removed minerals from the plaintiff's land. I do not know of any such case of waiver of trespass before *Powell* v. *Rees* (1837).[5]

There are not many early cases on waiver of trespass to chattels. This is due to the fact that a trespass to chattels is usually trivial or amounts to conversion. The doctrine that trover would lie for a wrongful taking was established in 1627,[6] and until 1841[7] it was not settled that a mere asportation amounting to trespass might not amount to conversion; trover was the usual action for a wrongful taking. In *Thomas* v. *Whip* (1715)[8] the defendant had been nurse to the plaintiff's intestate, and when he died went off with the money he had about him; this was clearly trespass, but the court treated it as trover which

[1] *Abbotts* v. *Barry*, 2 Brod. & B. 369.

[2] In *Edmeads* v. *Newman*, (1823) 1 B. & C. 418, Lord Ellenborough nonsuited a plaintiff because he should have brought case for deceit, but on motion for a new trial the rest of the court upheld an action for money had and received on the ground that deceit could be waived. Where a contract obtained by fraud cannot be rescinded because the plaintiff cannot make restitution, the claim cannot be for money had and received: *Clarke* v. *Dickson*, (1858) E. B. & E. 148, discussed at p. 84 below.

[3] *Lectures*, xv.

[4] *Birch* v. *Wright*, (1786) 1 T.R. 379.

[5] 7 Ad. & El. 426.

[6] *Kynaston* v. *Moore*, Cro. Car. 89. *Fouldes* v. *Willoughby*, 8 M. & W. 540.

[7] Buller, N.P. 130.

could be waived. Lord Mansfield assumed that trespass could be waived.[1] The earliest case where the tort waived was certainly trespass to goods is *Oughton* v. *Seppings* in 1830,[2] where a sheriff had wrongfully taken a pony and sold it under a writ of *fi. fa.*; the plaintiff waived the trespass and recovered on a claim for money had and received. The plaintiff had undoubtedly been in possession of the pony, but whether she had sufficient title to have maintained trover was doubtful; hence her reliance on trespass. There are no subsequent cases which negative the view that a plaintiff may still waive trespass to chattels.

(4) The scope of waiver of tort

It is probable that the precise scope of waiver of tort cannot be regarded as settled.[3] Waiver of tort has had various advantages in the past and some of these are still with us;[4] the rule *actio personalis moritur cum persona* was applicable to tort alone, and could be avoided by waiver, but now the Law Reform (Miscellaneous Provisions) Act 1934 has removed the need for such waiver. So long as the forms of action lasted there was a tendency to increase the use of the common indebitatus counts.[5] The difficulty felt by lawyers was in drawing a line where waiver ceased to be possible; if one tort could be waived, why not all? Scroggs, C.J., thought that if waiver of disturbance of office was allowed "a man may as well bring an indebitatus assumpsit where another takes money by force from his person; or where he takes away my horse, or for any account whatsoever",[6] but after considerable discussion he allowed waiver of disturbance of office. It is probable that the line was drawn by the application of the principle that an action for money had and received would not lie unless a specific sum of money had been received, or could

[1] *Hambly* v. *Trott*, (1776) 1 Cowp. 371, at 375; the case was decided on waiver of trover.

[2] 1 B. & Ad. 241. In *Rodgers* v. *Maw*, (1846) 15 M. & W. 444, there are dicta of Pollock, C.B., at p. 448 treating waiver of trespass to chattels as well settled law. See also *Neate* v. *Harding*, (1851) 6 Exch. 349, discussed at p. 78 below.

[3] Winfield, *Province of Tort*, 169. Salmond, *Torts*, 8th ed., p. 194.

[4] Winfield, *Province of Tort*, 141–6.

[5] They are given prominence in Bullen and Leake, 3rd ed. 1868.

[6] *Howard* v. *Wood*, (1679) Freeman at p. 479. I discuss this case at pp. 62 and 72 above.

be deemed to have been received. The latter proposition makes the principle vague and difficult to apply, whilst if certain cases[1] are good law the principle must be interpreted so widely that it ceases to be of much utility. However, that principle is a guiding thread through the bulk of the cases. The historical origin of indebitatus assumpsit accounts for the idea that the action lies only for a specified amount of money. The rule of debt that the exact sum claimed must be proved was at first applied to indebitatus assumpsit, and in insimul computasset the rule survived until 1767.[2] The basic rule was that indebitatus assumpsit would not lie if the defendant had received no money.[3] The first case establishing an exception was *Longchamp* v. *Kenny* (1779);[4] here *A* handed a masquerade ticket to *B* for *B* to sell at a fixed price or to return it to *A*. The ticket came into the possession of *C*. *B*, under threat of an action, paid the fixed price to *A*, and sought to recover as money had and received against *C*. In previous cases of waiver of trover the defendant had sold the goods, but here there was no evidence of whether *C* had sold the ticket or still held it. Lord Mansfield, after pointing out that the defendant had notice of the nature of the claim and so could not be surprised at the trial, held that as the defendant had not produced the ticket it was a fair presumption that he had sold it, and the plaintiff could recover the fixed price. The rest of the court agreed, but thought that the money might have been recovered as money paid to discharge the defendant from a liability. In this case the price was fixed, but in a later case it was held that the jury could from the evidence infer both a sale and the price for which the goods were sold.[5] An attempt was made to use *Longchamp* v. *Kenny* as authority for allowing a plaintiff to recover as money had and received the value of

[1] *Lightly* v. *Clouston*, (1808) 1 Taunt. 112; *Foster* v. *Stewart*, (1814) 3 M. & S. 191; and see p. 80 below.

[2] *Thompson* v. *Spencer*, Buller N.P. 129.

[3] *Nightingal* v. *Devisme*, (1770) 5 Burr. 2589.

[4] 1 Doug. 138. The possibility of treating a chattel as money was discussed in *Norris* v. *Napper*, (1704) 2 Ld. Raym. 1007, where Holt, C.J., inclined for the plaintiff, but the case is inconclusive.

[5] *Powell* v. *Rees*, (1837) 7 Ad. & El. 426, waiver of trespass for coal wrongfully abstracted by plaintiff's intestate; the quantity of coal taken was proved by surveyor's estimates, and the jury inferred that it was sold at market prices.

goods due to him, irrespective of any actual or presumptive sale; the attempt was not successful as a sale and receipt of money is only to be inferred from the evidence.[1] Thus when a sheriff has taken goods in execution, but not yet sold them, he cannot be liable for their value as money had and received;[2] when he has sold the goods the proceeds are held for whoever is entitled.[3] The position where the defendant holds goods belonging to the plaintiff or due to him was explained in *Bennett* v. *Francis* (1801):[4] then trover cannot usually be waived, for that would deprive the defendant of his right to hand over the goods and pay nominal damages in trover; the court held that there must be some act by the defendant showing that he intends to keep the goods and pay the value, such as a statement by the defendant that he will pay the value if the plaintiff proves his title, or where (as in the actual case) the defendant pays into court. In *Reed* v. *James* (1815)[5] a sheriff had levied execution after the judgment debtor had committed an act of bankruptcy, and handed the goods seized to the judgment creditor who gave a bill of sale to the sheriff for them. Lord Ellenborough held that the assignees in bankruptcy could recover from the judgment creditor the sum named in the bill of sale, as money had and received, although he thought that trover was a preferable action. In such cases the defendant has not received money either actually or by presumption of fact; it appears to rest on estoppel.

It thus appears that the mere fact that *A* wrongfully takes the goods of *B*, does not give *B* the right to waive the tort of trespass or conversion; *B* must establish a sale (actual or presumptive) of the goods by *A*, or show that *A* is estopped from denying that he will keep the goods and pay for them if *B* establishes his title. This explains the judgment in *Neate* v. *Harding* (1851).[6] The defendant had taken money belonging to the plaintiff and deposited it in a bank. Three judges had no doubt that the plaintiff

[1] *Leery* v. *Goodson*, (1792) 4 T.R. 687.

[2] *Thurston* v. *Mills*, (1812) 16 East 254, at 274; *Swain* v. *Morland*, (1819) 1 B. & B. 370.

[3] Usually for the judgment debtor, *Dale* v. *Birch*, (1813) 3 Camp. 247, or assignees in bankruptcy, *Young* v. *Marshall*, (1831) 8 Bing. 43.

[4] 2 Bos. & Pul. 550.

[5] 1 Stark. 134. *Standish* v. *Ross*, (1849) 3 Exch. 527, is a similar case.

[6] 6 Exch. 349.

could waive the trespass. Martin, B., thought that the action for money had and received would not have lain if the defendant had merely taken the money, but as it was paid into a bank, thus making a contract between defendant and the bank, he upheld a decision in favour of the plaintiff. Martin, B., was answering an argument of counsel to the effect that waiver was only possible when goods wrongfully taken had been sold or converted into money, and accepting that proposition he found that deposit of money with a bank was equivalent to the sale of goods. Since the sole purpose of showing a sale in waiver of trover is to establish a receipt of money there is obviously no need to show anything resembling a sale when the receipt of money is a fact.[1] It was decided early in the nineteenth century that an allowance in an account is a sufficient "receipt of money" to support a claim for money had and received.[2] Where that which has been received is not "money" in the sense of legal tender, it has been treated as money whenever it has appeared that the parties so regarded it. In *Harington* v. *Macmorris* (1813)[3] an objection was taken that the money received was foreign currency, but Gibb, J., said that that objection was exploded thirty years before; this is well settled.[4] Country banknotes were treated as money in 1810[5] and a cheque in 1827.[6] The law was summed up by

[1] Keener, *Quasi-Contract*, 180–1, discusses this case without apparently appreciating these points.

[2] In *Andrew* v. *Robinson*, (1812) 3 Camp. 199, the defendant was an insurance broker who had been instructed to receive money from underwriters on a policy insuring the plaintiff; the defendant received credit from the underwriter in an account between them, the underwriter's name being then erased from the policy; it was held that the defendant was liable to the plaintiff for money had and received. The principle was applied in *Wilson* v. *Coupland*, (1821) 5 B. & Ald. 228, and *Gingell* v. *Purkins*, (1850) 4 Exch. 720.

[3] 5 Taunt. 228.

[4] It was queried in *M'Lachlan* v. *Evans*, (1827) 1 Y. & J. 380, but in *Ehrensperger* v. *Anderson*, (1848) 3 Exch. 148, Parke, B., at 155, disapproved of that case and followed *Harington* v. *Macmorris*.

[5] *Pickard* v. *Bankes*, 13 East 20, *per* Lord Ellenborough: "Provincial notes are certainly not money; but if the defendant received them as money and all parties agreed to treat them as such at the time, he shall not now turn round and say that they were only paper and not money." To the same effect, *Fox* v. *Cutworth*, cited by Best, C.J., in 4 Bing. 179 as having been decided by him in 1825.

[6] *Spratt* v. *Hobhouse*, 4 Bing. 173; here the draft was not technically a cheque, but the principle was established.

Best, C.J.: "The principle in all the cases is, that if a thing be received as money, it may be treated and recovered as such."[1]

In two cases of waiver of tort, *Lightly* v. *Clouston* (1808)[2] and *Foster* v. *Stewart* (1814),[3] the conception of "money received" reached its maximum extension. In both cases the defendant had enticed away the plaintiff's apprentice, thereby receiving the benefit of the apprentice's labour; it was held that the value of that labour could be recovered as money had and received. It is doubtful whether these two cases can be considered good law to-day.[4] If they are good law, that does not actually dispose of my contention that the limit of waiver of tort has been the conception of "money received", because the labour of apprentices can be specified and valued by current wage rates; if we treat labour as a commodity, then a wrongful use of labour belonging to another is not essentially different from a wrongful abstraction of coal belonging to another.

Presumably the reason why no plaintiff has ever sought to waive assault or libel is because he would be unable to establish any "money received" by the defendant; even if a plaintiff chose to abandon the customary claim for general damages and seek special damage only (in the sense of claiming items of damages which are pleaded and proved specifically), he does not show that the defendant has received anything, for in such cases the loss to the plaintiff bears no relation to the gain (if there is any) to the defendant. The essence of "money received" has always been a specified and proved gain to the defendant, and it is unlikely that such gain would occur through committing an assault or publishing a libel.

The rule that a defendant must not be prejudiced by the plaintiff suing on indebitatus assumpsit instead of in tort appears to have had no real limiting effect upon the scope of waiver of tort. The chief application of the rule was to prevent a defendant being surprised at the trial by a claim of which he did not know the substance; this was possible owing to the simple form of the

[1] *Spratt* v. *Hobhouse*, 4 Bing. at 179. The same point has arisen in claims for "money paid"; see p. 48 above.

[2] 1 Taunt. 112. [3] 3 M. & S. 191.

[4] Salmond, *Torts*, 8th ed. 194; Winfield, *Province of Tort*, 175.

common counts, but in the earlier nineteenth century a defendant could demand particulars of a claim on a common count.[1] The rule never had any application where the right to sue in tort was thought of as existing but unenforceable: hence it has been undoubted since 1837[2] that an administrator or executor may be liable on waiver of deceased's tort although the *actio personalis* rule would bar a remedy in tort; similarly, an action in tort may have a special period of limitation which is shorter than the normal period prescribed for indebitatus assumpsit. In fact it is probable that the practice of waiver of tort received considerable impetus from its application to cases where action in tort was barred. Statutes of the later eighteenth century began the custom of providing protection for public authorities in the form of short periods of limitation in tort and the requirement of a notice of claim being made within a short time of the event complained of. Attempts were made to evade these provisions by waiver of tort:[3] a good deal has depended on the drafting of the statute, and practice has not been uniform.

(5) The doctrine of election

In cases where it is open to an injured person to sue in tort or to waive the tort it is necessary for him to elect which remedy he will pursue. This is well established, but there is no clear exposition of the rule;[4] this appears to be due to an unfortunate grouping together of cases which really rest on different prin-

[1] The Common Law Procedure Act, 1852, s. 49, removed the necessity of pleading needless averments. The form of pleading in indebitatus counts was set out in Schedule (B) to the Act, where the forms prescribed are very brief; the General Rules as to Practice made in Hilary Term 1853 provide that a plaintiff must deliver or file particulars of such claim (Rule 19).

[2] *Powell* v. *Rees*, (1837) 7 Ad. & E. 426, settles the rule that a plaintiff can waive deceased's tort and sue for money had and received. Lord Denman, C.J., based his decision on *Hambly* v. *Trott*, (1776) 1 Cowp. 371; this case decided that trover does not lie against an executor for a conversion by his testator; Lord Mansfield was clear, at pp. 373 and 377, that if the deceased had sold the goods converted an action for money had and received would lie against the executor, but this was dicta.

[3] *Irving* v. *Wilson*, (1791) 4 T.R. 485; *Greenway* v. *Hurd*, (1792) 4 T.R. 553; *Wallace* v. *Smith*, (1804) 5 East 115; *Parsons* v. *Blandy*, (1810) Wight. 22; *Umphelby* v. *M'Lean*, (1817) 1 B. & Ald. 42; *Morgan* v. *Palmer*, (1824) 2 B. & C. 729. The cases are reviewed in *Waterhouse* v. *Keen*, (1825) 4 B. & C. 200, at 211.

[4] The case law is given in Smith, L.C., in the notes to *Smith* v. *Hodson*.

ciples. There are many instances where the same evidence would support different legal remedies, and the common law rules were: (i) If there were two different kinds of remedy, such as real and personal action, then the plaintiff must elect which he will pursue, but if they are of the same kind then he need not elect; hence a non-suit in account does not bar a subsequent action of debt. (ii) A judgment always bars a subsequent action in the same or different form if the same evidence will support both actions.[1] In the case of *Hitchin* v. *Campbell* (1772)[1] it was decided that assignees of a bankrupt could sue a person who had sold goods of the bankrupt either in tort or by waiving the tort, but that having obtained a judgment in trover they were barred from further proceedings for money had and received. It was said that the plaintiffs had "made their election", but it is clear that the *ratio decidendi* was that a judgment bars further proceedings on the same cause of action. In a later case recovery by action for money had and received was described as a "conclusive election to waive the tort".[2] There is no reason for regarding such cases as resting on the doctrine of election at all; they rest on an independent rule of *res judicatae*.

According to the first rule given above there should be no need of election, since tort and assumpsit are both personal actions. If, for instance, the plaintiff was injured through the negligence of a railway company carrying him as a passenger, then he could sue in case or assumpsit; under the Common Law Procedure Act, 1852, s. 41, the two forms of action could be brought together as separate counts in one action; there is no need of election, for there is both a tort and a breach of contract, and judgment may be given for the plaintiff without specifying whether he has succeeded on one count or on both. Action in tort and indebitatus assumpsit on waiver of tort have always been regarded as strictly alternative; the act complained of must be regarded as a tort or a (constructive) contract, without any possibility of it being both. This appears to rest on the idea that a plaintiff cannot be allowed to have the advantages of both

[1] Co. Litt. 146 a. *Hitchin* v. *Campbell*, (1772) 2 W.Bl. 827, S.C. *Kitchen* v. *Campbell*, 3 Wils. K.B. 304. There are exceptions to the second proposition, immaterial here.

[2] *Smith* v. *Baker*, (1873) L.R. 8 C.P. 350, *per* Keating, J., at 356.

forms of action. He must elect which form of action suits him best and having so elected he must put up with any advantages that such form of action may give to the defendant. Hence if the assignees of a bankrupt sue a creditor, who has fraudulently received goods, by waiving the tort, the defendant can set off the debt due to him from the bankrupt.[1] Election could consist of some act done before action brought, and it would be a question of fact whether it was an unequivocal act binding the plaintiff. In *Wilson* v. *Poulter* (1730)[2] money of a bankrupt had been given to the defendant to buy bonds, and the assignees had seized some of the bonds bought, and then brought trover for the money spent in buying the rest of the bonds. It was held that seizing the bonds was an affirmance of the defendant's acts, and that the plaintiff could not avow the act as to part and disavow for the rest. There could be no election after action brought, because the form of action used was in itself an election.[3]

It appears to be still good law that the form of action shows election; it was said in 1873 that "if an action for money had and received is brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way".[4] Since the Common Law Procedure Act, 1852, it has been possible to plead in tort and waiver of tort, and this is now the usual practice.[5] If such pleading is used, then it is obvious that the commencement of the action cannot show an election. It is possible that no election is necessary here,[6] but the better view appears to be that election is still required, and that it is a matter of fact; the election may be made at any time up to judgment, which is of course conclusive.[7] If this view of the development

[1] *Smith* v. *Hodson*, (1791) 4 T.R. 211. This idea that the plaintiff must be consistent is clearly shown in *Wilson* v. *Poulter* discussed below.

[2] 2 Str. 859.

[3] *Smith* v. *Hodson*, (1791) 4 T.R. 211, *per* Lord Kenyon: "Now here the assignees, by bringing the action on the [constructive] contract, recognised the act of the bankrupt, and must be bound by the transaction."

[4] *Smith* v. *Baker*, (1873) L.R. 8, C.P. 350, *per* Bovill, C.J., at 355.

[5] See precedent in Bullen and Leake, 8th ed. p. 272.

[6] *Andrews* v. *Hawley*, (1857) 26 L.J. Ex. 323, but this is an isolated case.

[7] *Rice* v. *Reed*, [1904] 1. Q.B. 54.

is correct, then a statement of present-day law should rest on four propositions.

(*a*) A judgment is conclusive.

(*b*) An act of election before action brought binds the plaintiff and is a question of fact.

(*c*) A single form of action is an election in law.

(*d*) If both forms of action are pleaded, there is no election in law, but the plaintiff is bound by any act of election (question of fact) before judgment.

One type of case requires special treatment. Where a person has been induced to enter into a contract through fraud and has paid money under that contract, if he can rescind the contract he can recover the money he has paid, but if the contract can no longer be rescinded he must sue on the contract or in tort.[1] When the contract is rescinded the plaintiff can recover what he has paid and in addition general damages for any loss he may have sustained.[2] If recovery of what has been paid is regarded as waiver of deceit, then that should bar a claim for general damages: since they are cumulative, either we have an exception to the rules of waiver of tort, or else recovery of such money does not rest on waiver of tort. Whatever analysis is adopted the rules are best considered as part of the law of contract.

SECTION 23

Recovery of Money on Failure of Consideration

The early use of indebitatus assumpsit has been described by Sir William Holdsworth.[3] That the action lies to recover what has been paid has been settled law at least since *Holmes* v. *Hall* in 1704.[4] If the contract is illegal, special rules apply which are discussed in sect. 25.

There must be a *total* failure of consideration. This rule was

[1] *Clarke* v. *Dickson*, (1858) E.B. & E. 148. And see Salmond and Winfield, *Contract*, s. 82.

[2] *Newbigging* v. *Adam*, (1886) 34 Ch.D. 582, *per* Bowen, C.J., at 592. The practice is to claim rescission (meaning a declaration that the plaintiff has validly rescinded), return of money paid, and damages; Bullen and Leake, 8th ed. p. 397.

[3] H.E.L. VIII, 93.

[4] 6 Mod. 161.

more or less recognised in *Dutch* v. *Warren* (1720),[1] but it cannot be taken as being properly settled until later. During the seventeenth century the effect of breach of contract varied according to whether the duties of the parties were regarded as independent or dependent; if they were independent, then failure by one party to perform did not discharge the other party; if they were dependent, the plaintiff must perform before he could sue the other party. Hardship resulted from the body of rules built up on this distinction, and in the earlier eighteenth century the courts managed to avoid the difficulty by treating the duties of the parties as normally concurrent conditions; if one party was ready and willing to perform he could treat failure to perform by the other as discharge of the contract. Hence we can say that discharge of contract by breach was established in the seventeenth century but radically extended in the eighteenth century as a result of new views on the nature of the duties of the parties. The older rules about independent and dependent conditions were no longer of interest. The important question had come to be what kind or degree of failure of performance entitled one party to rescind the contract.[2] This may explain why the requirement that money can be recovered only when there is *total* failure of consideration does not appear clearly until the latter part of the eighteenth century. In *Towers* v. *Barrett* (1786)[3] Buller, J., said: "Where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end: but if it continue open, he can only recover damages, and then he must state the special contract and the breach of it." Similar language was used in *Giles* v. *Edwards* (1797),[4] where discharge by default of the other party is clearly explained. If the plaintiff has received some benefit in return for the money he has paid there is no total failure of consideration.[5]

[1] 1 Stra. 406. Lord Mansfield gives a fuller account of the case in *Moses* v. *Macferlan*, 2 Burr. at 1011.

[2] H.E.L. VIII, 70–80. [3] 1 T.R. 133. [4] 7 T.R. 181.

[5] *Taylor* v. *Hare*, (1805) 1 Bos. & Pul. (N.R.) 260; money paid for a licence to work a patent could not be recovered when it later appeared that the patent was invalid, because the plaintiff had manufactured under the licence and would not have done so if he had had no licence. *Dewberry* v. *Chapman*, (1696) Holt K.B. 35, Comb. 341, noted at p. 74 above, might be upheld on this ground if the apprenticeship was partly served.

Therefore if a plaintiff claims recovery of money for total failure of consideration he must show that the contract is at an end. A contract can come to an end by agreement, performance, frustration, or breach; this omits death, bankruptcy and some other cases which do not affect the argument. Neither agreement nor performance will ever lead to a claim of the kind we are considering, and for frustration there is the rule that money paid cannot be recovered.[1] It follows that a claim for return of money on total failure of consideration is necessarily alternative to a claim for breach of contract. The nature of a claim for return of money paid on total failure of consideration is peculiar; the payment obviously must have been made in pursuance of a contract, but a claim for repayment cannot rest on that contract because that contract has *ex hypothesi* ceased to exist.[2] If the claim for repayment cannot rest on the contract it may be regarded as resting on a quasi-contract. But whatever juristic analysis is adopted, the practical point is that such a claim is alternative to a claim for breach of contract, and the only point a prospective plaintiff has to consider is whether he is going to demand return of what he has paid or ask for damages. For this reason there is much to be said in favour of treating this topic as part of the rules for assessing damages on breach of contract.

There are three kinds of transactions where it may seem wrong to treat recovery of money paid as no more than a method which a plaintiff can choose for assessing damages on breach of contract:

(1) A special rule may restrict damages to the amount of money already paid by the plaintiff. This happens in contracts for the sale of land which fail because the vendor cannot make title through no fault of his own. The purchaser can only recover

[1] In *Gillan* v. *Simpkin*, (1815) 4 Camp. 241, passage money paid in advance could not be recovered when the ship was lost soon after the commencement of the voyage. *Chandler* v. *Webster*, [1904] 1 K.B. 493, is now the leading case.

[2] This is an old difficulty: could *actio ex vendito* ever lie on a contract of sale which no longer exists? D. 18. 1. 6. 1, gives the action; D. 19. 5. 12, treats it as an innominate contract. A similar point occurs in the case of recovery of money paid on an illegal contract (sect. 25 below); recovery cannot rest on the contract between the parties for that is illegal and void.

the amount of any money he may have paid.[1] This is always treated as a rule for measuring damages. Similarly, sect. 7 of the Sale of Goods Act, 1893, provides that if specific goods perish without fault of either party before the risk passes to the buyer the contract is avoided; if the buyer has paid he can of course recover that sum.

(2) Suppose *A* agrees to buy a specified horse from *B*, and pays for it, and unknown to the parties the horse died before the date of the contract. The purchase price is often said to be recoverable as money paid for a consideration which wholly fails. This is wrong. There never has been a contract, and the money was paid by mistake.[2]

(3) Recovery of insurance premiums when the risk has never attached. Indebitatus assumpsit was used for such cases as early as *Martin* v. *Sitwell* (1691),[3] and this type of case was referred to by Holt, C.J., in deciding *Holmes* v. *Hall* (1704),[4] where he classed together the return of premiums and money paid on bargains which had collapsed. It is still customary to speak of these cases as resting on failure of consideration. It is a peculiar "failure of consideration", since the insurer breaks no contract, the blame (if any) attaching solely to the plaintiff. Obviously a claim for return of premiums is not here alternative to any action on the contract against the insurer, for he has not broken the contract. Nor can we class it always as mistake, since the only "mistake" may be the fact that the plaintiff intended to ship goods and then changed his mind.

So far as marine insurance is concerned the rules are now in the Marine Insurance Act, 1906, s. 84. The basis of the liability is more properly regarded as resting on an implied term of the contract.[5] For other forms of insurance it will generally be found

[1] *Flureau* v. *Thornhill*, (1776) 2 W.Bl. 1078.

[2] Sale of Goods Act, 1893, s. 6, makes the contract "void". There has been mistake as to the subject-matter; compare *Raffles* v. *Wichelhaus*, (1864) 2 H. & C. 906.

[3] 1 Show. K.B. 156. [4] 6 Mod. 161.

[5] This possibility was present to Lord Mansfield. In *Stevenson* v. *Snow*, (1761) 3 Burr. 1237, an action for return of a portion of a premium, the jury found that there was a usage to that effect, but as it was too vague the Court ignored it, and decided the case on absence of consideration, using the jury's finding of the usage as "strong proof of the equity of the thing"; it is a curious judgment.

that the rules as to insurable interest will avoid a policy effected before risk attaches, and so premiums are really recoverable as money paid by mistake.

SECTION 24

Quantum Meruit

Professor Winfield has pointed out that *quantum meruit* has three distinct meanings, of which only one can be considered quasi-contractual, namely: where one party to a contract has disabled himself from performing the contract, the other party may treat the contract as at an end and sue on a *quantum meruit* for what he has done in complete or partial performance.[1] It would appear that the *quantum meruit* claim arising on a breach of contract was not recognised until near the end of the eighteenth century; this is due to the fact that the rules as to discharge of contract by breach were not settled until then, as has been explained in the last section. This type of *quantum meruit* is the analogue of claims for repayment on total failure of consideration; in both cases the contract must be at an end, and there is a logical difficulty in saying that a claim is based on a contract which *ex hypothesi* is extinct. It would be more convenient to-day to regard this type of *quantum meruit* as giving a rule which a plaintiff may invoke for assessing damages in an action on the contract.

SECTION 25

Recovery of money paid on an illegal consideration

Until the latter part of the eighteenth century there are few cases, and those are hardly intelligible. The much cited case of *Tomkins* v. *Bernet* (1693)[2] lays down that money paid on an illegal usurious contract cannot be recovered. In both reports

[1] Winfield, *Province of Tort*, 157–60; the other meanings are: (i) Where a contract has not been observed but it can be implied from the conduct of the parties that they have substituted another contract for the first, an action can be brought on the second contract for what one party has done; (ii) An action for a reasonable price or remuneration where the contract does not fix the price or remuneration.

[2] Salk. 22, Skin. 412.

there is mention of the rule that bribes cannot be recovered. A few years later counsel said that it had often been ruled that bribes could be recovered,[1] and in *Wilkinson* v. *Kitchin* (1697),[2] where an action was brought for recovery of money expended by the plaintiff's solicitor in bribery, the same counsel repeated his assertion, and the report says that Holt, C.J., directed a verdict for the plaintiff. It has been suggested that the reporter made a mistake,[3] but the case has had some influence.[4]

There can be little doubt that *Tomkins* v. *Bernet* was considered good law. In *Bosanquet* v. *Dashwood* (1734)[5] the Court of Chancery decreed an account of money overpaid on a usurious contract, assuming that indebitatus assumpsit would not lie.

In the time of Lord Mansfield the law became settled in substantially the present form. As a general proposition money paid under an illegal contract cannot be recovered, but recovery is allowed where the parties are not *in pari delicto*, or where the contract is executory.

(i) *Where the parties are not in pari delicto.* This rule dates from *Smith* v. *Bromley* (1760).[6] A creditor having refused to sign a bankruptcy certificate unless he was paid money, the sister of the debtor paid the creditor the sum he demanded. Such transactions had been made illegal by statute, but Lord Mansfield held that the money paid was recoverable: "If the act is in itself

[1] *Anon*, (1695) Comb. 341; Holt, C.J., replied "Never by me."

[2] 1 Ld. Raym. 89.

[3] H.E.L. viii, 94. The case is queried in later editions of the report and in nineteenth-century abridgments. Nobody has suggested that the plaintiff may have provided the money for costs and that the bribery was unauthorised, although that is consistent with the report.

[4] It was cited without disapproval in *Astley* v. *Reynolds*, (1731) 2 Strange 915, and in *Neville* v. *Wilkinson*, (1782) 1 Bro. C.C. 543, at 547. In *Walker* v. *Chapman*, (1773) Lofft 342, Aston, J., thought that the doubts attaching to *Tomkins* v. *Bernet* (see p. 90 below) made the reference there to bribery also doubtful, adding: "I question whether bribery in elections, the growing vice of this kingdom, would not be more likely to be reduced if it were known to be otherwise, and that a briber could recover against the bribee." I doubt if it can be taken as quite settled that a bribe cannot be recovered until *Pickard* v. *Bonner*, (1794) Peake 289, where Lord Kenyon considered that Holt, C.J., had allowed recovery in *Wilkinson* v. *Kitchin* but that Lord Mansfield had held otherwise, and that he should follow Lord Mansfield's decisions although he felt that the rule attributed to Holt would better serve public policy.

[5] Cases temp. Talbot 38.

[6] 2 Doug. 696 n.

immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, potior est conditio defendentis. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover, and it is astonishing that the reports do not distinguish between the violation of the one sort and the other" (at p. 697). As with many of Lord Mansfield's judgments, there was no substantial authority; he discussed *Tomkins* v. *Bernet* (1693)[1] (giving that case an interpretation which fitted his argument), and the Chancery case of *Bosanquet* v. *Dashwood* (1734).[2] He added (at p. 698) that the rule "does not depend on general reasoning only, but there are analogous cases", citing *Astley* v. *Reynolds* (1731).[3] This new rule does not appear to have been questioned.[4] There may have been some doubt about the case[5] among the profession, for Lord Mansfield repeated this proposition in three other cases, stating it with a care usually reserved for points not generally understood.[6] Most of the early cases turned on illegal insurance of lottery tickets, and here the court was much influenced by the fact that the statutory penalty fell on the insurer alone, showing that illegality was for the protection of insurers against their own folly.[7] The mere fact that

[1] Salk. 22, Skin. 412. Neither report says whether the claim was for return of principal and interest paid on the usurious contract, or for interest paid beyond the legal maximum; Lord Mansfield assumed that it was the former, and that the reporter was too ignorant to understand the case.

[2] Cases temp. Talbot 38.

[3] 2 Strange 915, noted p. 65 above.

[4] In *Collins* v. *Blantern*, (1765) 2 Wils. K.B. 341, at 350, Wilmot, C.J., said, with a flourish from the Corpus Iuris and Doctor and Student, that money paid on an illegal contract cannot be recovered, but it was not a point that was argued; it is an important case on evidence of illegality on a written contract.

[5] There was no adequate report of *Smith v. Bromley* until Douglas was published in 1783.

[6] *Clarke* v. *Shee*, (1774) 1 Cowp. 197, at 200; *Browning* v. *Morris*, (1778) 2 Cowp. 790; *Lowry* v. *Bourdieu*, (1780) 2 Doug. 468, at 472, where he expressly restated the rule to prevent it being thought that the court held that money paid on illegal contracts could always be recovered.

[7] *Jaques* v. *Golightly*, (1776) 2 W.Bl. 1073; approved in *Browning* v. *Morris*, (1778) 2 Cowp. 790; followed in *Jaques* v. *Withy*, (1788) 1 H.Bl. 65.

a penalty falls on one party alone will not enable the other party to recover.[1] The court must decide whether the illegality exists for the protection of persons in the position of the plaintiff, for the rule rests on the notion of oppression or inequality of bargaining power in the parties.[2] This is implicit in the judgments of Lord Mansfield to which I have referred.

Lord Mansfield was emphatic that illegality in contract was of two kinds: first, the type of peculiar illegality discussed in the last paragraph; second, general prohibitions which result in the parties being equally guilty.[3] However, his explanation that persons "over-reached, defrauded, or oppressed"[4] are not *in pari delicto* makes it obvious that he did not mean that money paid on illegality of the second kind could never be recovered. In 1794 Lord Kenyon did not think it necessary to cite any cases to support the proposition that a person who has been ignorantly engaged in an illegal contract through the fraud of another can recover what he has paid.[5] Here the recovery of money paid may be an alternative remedy, for where a person does an act innocent in itself under a contract, he can in general enforce that contract even if the act was illegal, provided that he acted *bona fide*.[6] Equitable remedies by way of restitution are available where the illegal contract was procured through the undue influence or fraud of the defendant.[7]

(ii) *Where the contract remains executory.* The rule is that money paid on an illegal contract can be recovered if the illegal purpose has not been carried out. The rule developed from the judgment of Buller, J., in *Lowry* v. *Bourdieu* (1780),[8] where he considered that a premium, paid on a policy illegal for lack of insurable interest, might have been recovered if the voyage was

[1] *Stokes* v. *Twitchen*, (1818) 8 Taunt. 492, 2 Moore 538; money paid on an unstamped apprenticeship deed with amount of premium left blank, contrary to a statute for protection of the revenue.

[2] This is clearly stated by Lord Ellenborough in *Williams* v. *Hedley*, (1807) 8 East 378.

[3] The clearest statement is in *Clarke* v. *Shee*, (1774) 1 Cowp. at 200.

[4] *Clarke* v. *Shee*, above. [5] *Drummond* v. *Deey*, (1794) 1 Esp. 152.

[6] *Fletcher* v. *Harcot*, (1622) Hutton 56, S.C. *Battersey's Case*, Winch 48; *Strongitharm* v. *Lukyn*, (1795) 1 Esp. 389.

[7] *Osborne* v. *Williams*, (1811) 18 Ves. Jun. 379; *Reynell* v. *Sprye*, (1852) 1 De G.M. & G. 660, is the leading case.

[8] 2 Doug. 468. This case is discussed at p. 59 above.

not over, but that since the voyage was finished the plaintiff could not succeed. He cited *Walker* v. *Chapman* (1773)[1] as laying down this distinction, but that case is badly reported and hardly bears out his contention. There appear to be no earlier cases recognising such distinction. Buller J.'s argument was adopted in subsequent cases.[2]

Some confusion was caused by the decision in *Lacaussade* v. *White* (1798),[3] where Lord Kenyon allowed a plaintiff to recover money paid on an illegal wagering policy when the date of the event wagered on had passed before any demand was made, on the ground that it was more consonant to public policy to allow recovery than to allow the defendant to retain his gains. On the strength of this case an action was brought to recover premiums on a policy to cover trading with the enemy,[4] and although that claim was unsuccessful, the doctrine of *Lacaussade* v. *White* still haunted the courts. Lord Kenyon later explained *Lacaussade* v. *White* as being a case of a stakeholder, and since he did that in a case where he really was dealing with a stakeholder[5] he merely added to the existing confusion. In 1810 the distinction between executed and executory contracts was restated in *Aubert* v. *Walsh*,[6] and *Lacaussade* v. *White* has since been treated as a transitory disturbance.

There are two cases where money paid can be recovered when the illegal purpose has been fulfilled. First, money paid to a stakeholder to abide the result of an illegal transaction is recoverable if demanded before it is paid over (see sect. 27).

Second, if a marriage brokage contract has been fulfilled that

[1] Lofft 342.

[2] *Andree* v. *Fletcher*, (1789) 3 T.R. 266; *Tappenden* v. *Randell*, (1801) 2 Bos. & Pul. 467, where the court said that it would not apply if the agreement was to do something grossly immoral; *Aubert* v. *Walsh*, (1810) 3 Taunt. 277; *Busk* v. *Walsh*, (1812) 4 Taunt. 290, where Mansfield, C.J., admired the good old days when there was no relief on an illegal contract, "but the law is now changed, so that if a man declares his dissent from an illegal wager before the event happens, even if it is the very day before it happens, he may recover back the money he has paid".

[3] 7 T.R. 535. *Neville* v. *Wilkinson*, (1782) 1 Bro. C.C. 543, also suggests that the right to recover money paid on an illegal contract is unqualified, but this case was not much cited.

[4] *Vandyck* v. *Hewitt*, (1800) 1 East 96.

[5] *Howson* v. *Hancock*, (1800) 8 T.R. 575.

[6] 3 Taunt. 277.

is no bar to recovery of money paid. The historical reasons for this rule are given in the case of *Hermann* v. *Charlesworth*.[1]

For an agent's duty to account to his principal, *v.* sect. 29.

SECTION 26

Claims for money received by the defendant from a third person for transmission to the plaintiff

This heading covers cases where *A* gives money to *B* or provides *B* with goods to realise, instructing *B* to pay to *C*, or where *A* instructs *B* to pay to *C* out of a fund belonging to *A* which *B* already holds. *C* can in some circumstances (discussed below) recover from *B* in an action for money had and received.

Medieval law allowed a beneficiary to sue the person who had received money or goods for his use.[3] There is no suggestion that any special relationship was required between plaintiff and defendant; a plaintiff simply had to prove that the defendant had received money for the plaintiff, or as it was generally expressed, "to the use of the plaintiff". Action of debt or account was still used for this purpose in the earlier seventeenth century, and the cases do not show any requirement of "privity" between the parties.[3] There are two early cases where a beneficiary sought a remedy in assumpsit. In *Howlett* v. *Osbourn* (1595)[4] "The case was, that one delivered ten pounds to the defendant to deliver to the plaintiff; and the defendant promised the plaintiff to pay it unto him. Upon this the plaintiff brought his action.—And ruled, that it lies not." No reasons are given, but since Walmesley, J., added: "if the plaintiff had given a day before the payment thereof, it had been a good consideration", the court presumably held that the plaintiff had not shown consideration. The next attempt to use assumpsit, *Gilbert* v. *Ruddeard* (1607),[5] where the facts were somewhat different, was successful. In this case *T* was indebted to the plaintiff, and *T* gave the defendant £50 to pay to the plaintiff in part settlement of *T*'s debt. The plaintiff asked the defendant to pay it over, and

[1] [1905] 2 K.B. 123. See also Salmond and Winfield, *Contract*, 152–3.
[2] Sect. 14 above.
[3] Cases are cited p. 31 n. 6 above.
[4] Cro. Eliz. 380.
[5] Note to 3 Dyer 272 b in 1794 ed.

the defendant replied that he was busy and would pay on such a day, and the defendant did not pay. It was held that assumpsit lay. "Tanfield agreed, when there is any precedent matter which caused the delivery, as in our case by a debt, then the delivery cannot be countermanded, but here there is another consideration besides the debt, for he is to come to the house of the defendant to fetch the money. Yelverton agreed." Many points might be made upon Tanfield's remarks; it is however clear that in this case as in *Howlett* v. *Osbourn* it was thought that consideration was necessary. It is not clear that indebitatus assumpsit was the form of action; it may well have been express assumpsit.

Indebitatus assumpsit in these cases was merely a substitute for account or debt. It was a common argument in the seventeenth century that indebitatus assumpsit lay where account lay.[1] Debt also lay instead of account in such cases, although it is possible that this was not definitely settled until 1614.[2] The liability to account was imposed primarily by law.[3] In the first clear case of indebitatus assumpsit for this purpose, *Beckingham and Lambert* v. *Vaughan* in 1616,[4] the plaintiff succeeded on a simple allegation that the defendant had received money from divers persons to the use of the plaintiff. According to Rolle, assumpsit lay because debt lay. Nothing was said about consideration or privity.

The simple rule in *Beckingham and Lambert* v. *Vaughan* was restated in dicta in *Brown* v. *London* (1670)[5] by Hale and Rainsford: "If *A* delivers money to *B* to pay to *C*, and gives *C* a bill of exchange drawn on *B*, and *B* accepts the bill and doth not pay it, *C* may bring an indebitatus assumpsit against *B* as having received money to his use: But then he must not declare only on a bill of exchange accepted." *C* could sue *B* by action on the case on the custom of merchants, since he was the holder

[1] *Arris* v. *Stukely*, (1677) 2 Mod. 260, the court: "Wherever the plaintiff may have an account an indebitatus will lie"; this is too wide.

[2] P. 31 note 3 above. *Clark's Case*, (1614) Godb. 210; *Speake* v. *Richards*, (1618) Hob. 206, pl. 260; *Harris* v. *de Bervoir*, (1624) Cro. Jac. 687, Rolle Rep. 440.

[3] P. 32 above.

[4] 1 Rolle Rep. 391, Rolle Ab. f. 7, S.C. *Babington* v. *Lambert*, Moore 854.

[5] 1 Vent. 152, 1 Mod. 285.

of a negotiable instrument, but he could not use indebitatus assumpsit on the bill because the bill was regarded as a contract and there was no consideration moving from *C* to the acceptor. *C* could however have indebitatus assumpsit based on the actual receipt of money by *B* for his use.

In *Ward* v. *Evans* (1703)[1] the facts vary in detail according to the report, but are substantially these: One *F* sent his servant, accompanied by a servant of the plaintiff, to the defendant who was *F*'s banker, in order that the defendant might pay £60 to the plaintiff to cancel a bill on *F* presented for payment by the plaintiff. *F*'s servant produced a note for £100 due from the defendant to *F*,[2] and the defendant's servant endorsed on that note that £60 was paid, but instead of receiving £60 in cash the plaintiff's servant was given a goldsmith's note for £60 which was dishonoured. The plaintiff successfully sued the defendant in indebitatus assumpsit for money had and received. The case is of first class importance on the topics of a servant's authority and the effect of accepting a note in lieu of cash, but apart from those points it was necessary to decide whether the defendant had "received" money. The court had no difficulty in finding that the defendant's endorsement "amounts to a receipt of so much by the defendant to the plaintiff's use".[3] There is no mention in any of the reports of any contract or "privity" between plaintiff and defendant. Yet a few years later in a case where wages were due to *A*, and *A* ordered *B* to receive the wages and pay them to *C* (to whom *A* was indebted), Holt, C.J., ruled that *C* could not succeed in indebitatus assumpsit against *B*, giving no reasons for his decision.[4]

I do not know of any other cases bearing on this matter until *Israel* v. *Douglas* in 1789.[5] In this case *A* was indebted to *B*, and *B* indebted to *C*. *B* gave *A* an order to pay to *C*, and on the strength of that order *B* borrowed more money from *C*.

[1] 6 Mod. 36, 2 Ld. Raym. 928, Holt K.B. 120, 1 Com. 138, 2 Salk. 442.

[2] The early banking practice was for the banker to provide his customer with a credit note, like a modern letter of credit, on which sums paid out were endorsed.

[3] 2 Ld. Raym. at p. 930. The endorsement seems to have been treated as evidence of a receipt of money to plaintiff's use.

[4] *Crifford* v. *Berry*, (1709) 11 Mod. 241. 1 H.Bl. 239.

A informed *C* that he, *A*, accepted that order. It was held that *C* could succeed against *A* in an action for money had and received. The court considered that although *A* had not actually received any money, he was in the same position as if he had received money; Wilson, J., dissented, on the ground that this action can lie only when the defendant has actually received money. Gould, J., stated, with no qualification, that "If I pay money to you for another person, it is money had and received by you to his use".[1] Lord Loughborough considered the defendant "estopped as it were" from saying that the money was not due.[2] The idea that there must be some agreement between the defendant and the plaintiff appears also in *Stevens* v. *Hill* (1805).[3] *X* drew an order on *H* payable out of a particular account. The holder of the order took it to *H*, who said he would pay when he received money for that account. It was held that on proof that the defendant had received such funds the plaintiff could recover for money had and received. Lord Ellenborough referred to Lord Kenyon in a similar case overruling the objection that it was *nudum pactum* "and held that it was an appropriation of so much to the use of the holder of the draft".

The cases considered above show a consistent rule; action of account was superseded by indebitatus assumpsit, the substantive law remaining the same. Before considering the change which begins with *Williams* v. *Everett* (1811)[4] it is convenient to note certain factors which may have induced a change.

(1) By the early nineteenth century it is probable that the old learning about action of account had been forgotten. Account receives little attention in law books from the later eighteenth century onwards,[5] and counsel had ceased to argue that indebitatus assumpsit lay because account lay. Year Books and early reports do not appear to have been cited on this topic.

(2) The beneficiary's rights in these cases are much like those

[1] At p. 243.

[2] At p. 242. The plaintiff might have based his case on express assumpsit, there being a novation, but *Tatlock* v. *Harris*, 3 T.R. 174, 180, establishing the doctrine of novation was decided in the same year.

[3] 5 Esp. 247. [4] 14 East 582.

[5] Bl. Comm. III, 162 gives the subject less than a page.

of a beneficiary under a technical trust;[1] if this was the earlier conception it is easy to see why no relationship was required between the defendant ("trustee") and the plaintiff (actually called "cesty que use" in one case).[2] The plaintiff had to prove that the defendant received the money for the use of the plaintiff, which means that the defendant received the money for that purpose and consented so to apply it. A plaintiff would often be able to discharge this onus of proof by showing that the defendant had promised to pay over to the plaintiff money received from a third person; such promise would merely be evidence of pre-existing liability, but would tend to confuse the real cause of action.

(3) If the trust concept is eliminated, it is not easy to distinguish the principle of these cases from that of allowing a third person to sue on a contract to which he was not a party. *Dutton* v. *Poole* (1677)[3] held the field until the earlier part of the nineteenth century; the attack on "moral obligation" began in 1802.[4] As the principles of contract hardened it appeared that the beneficiary might have no rights, either because the handing over of the money to the defendant was *res inter alios acta*, or because an admission by the defendant that he so held the money (historically only evidence of liability to account) was thought of as a promise unenforceable because it was gratuitous.[5]

(4) Attempts were made to use an action for money had and received to enforce what was in reality an assignment of a chose in action not recognised at common law; such attempts were discouraged by the courts, and the reasons given influenced decisions where the principle of non-assignability did not arise.[6]

The case of *Williams* v. *Everett* (1811)[7] marks the beginning of a rule that a beneficiary must show some special relationship

[1] P. 31 above.

[2] *Harris* v. *de Bervoir*, (1624) Cro. Jac. 687.

[3] 2 Lev. 210. The interrelation of the rule that only a party to a contract can sue on it and the rule that a plaintiff must show that he gave consideration is well shown in *Dunlop* v. *Selfridge*, [1915] A.C. 847.

[4] H.E.L. VIII, 36–8.

[5] Conceptions of the law of contract have also had a limiting effect on the law of tort, as in *Winterbottom* v. *Wright*, (1842) 10 M. & W. 109, and *Earl* v. *Lubbock*, [1905] 1 K.B. 253. 34 *Columbia Law Review*, 53–55.

[6] P. 102 below.

[7] 14 East 582.

between himself and the receiver of money. This case is cited in very many nineteenth-century cases, and requires some examination. One Kelly sent bills to the defendant with a letter asking defendant to pay the proceeds to Kelly's creditors who would produce advice notes from Kelly. The plaintiff was a creditor of Kelly and produced an advice note, but the defendant refused to act on the letter, although he admitted that he had received instructions to apply the proceeds of the bills for such purpose. The plaintiff brought an action for money had and received. Lord Ellenborough, in a reserved judgment, gave reasons why he could not succeed: "If, in order to constitute a privity between the plaintiff and the defendants as to the subject of this demand, an assent express or implied be necessary, the assent can in this case be only an implied one, and that too implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it till paid, and its contents when paid, for the use of the remitter. It is entire to the remitter to give, and countermand, his own directions respecting the bill as often as he pleases, and the person to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they have once given, but are bound to hold it for the use of the appointee."[1] He then considered the position that would arise if the bill, or its proceeds, was accidentally destroyed, and finding that Kelly would have had to bear the loss he considered that that settled the question.[2] Two points

[1] 14 East, at p. 597.

[2] The plaintiff relied on *De Bernales* v. *Fuller*, (1810) 14 East, at p. 590, n. (a), 2 Camp. 426. A bill was payable at Fuller's banking house. The holder gave the bill to Newnhams (his bankers) to collect, and Newnhams lodged the bill with Fuller. The acceptor paid money to Fuller to meet the bill. Fuller did not pay the bill, and the holder, De Bernales, sued Fuller on the ground that Fuller had received money to the use of the holder whoever the holder might be. Lord Ellenborough held that he could not recover: "There was no privity proved between De Bernales and the Fullers...." A motion for new trial was allowed, and at the subsequent

in this judgment require discussion. First, it is implied that there must be "privity" between the parties. The use of "privity" in such cases appears to begin with Lord Ellenborough; he used the word in a case in 1809[1] and in *De Bernales* v. *Fuller*.[2] Secondly, the meaning of the word "privity" as used by Lord Ellenborough is hard to find. In the extract from his judgment in *Williams* v. *Everett* quoted above, it appears to mean either a statement by the defendant that he holds for the plaintiff, or else an "engagement" between defendant and plaintiff, the latter perhaps meaning a contract.

To continue a chronological account of the development of the notion of "privity" in these cases would simply be to give an intractable mass of conflicting authority. The principles of liability have been variously stated, and so it is convenient to separate the different versions into categories which may assist any future handling of the cases.[3] The question in each case is: If *A* has paid money to *B*, what must *C* prove if he is to succeed in an action for money had and received against *B*?

(1) *B* appropriates the money to *C*. This means that *B* admits he holds money for *C*'s benefit, and assents to pay it to *C* or to hold it at *C*'s disposal, that admission and assent being communicated to *C* by *B*.[4]

trial the court took it for granted that the plaintiff could succeed. In *Williams* v. *Everett*, Lord Ellenborough explained that Fullers "were in effect to be regarded in that case as the plaintiff De Bernales's agents, through the intervention of Newnhams' house, for the purpose of that receipt, and could therefore hold and apply it to no other", 14 East, at p. 598. It is a queer explanation, for it makes a paying banker the agent of a collecting banker's customer. If Fuller is regarded as the agent of Newnhams, that cannot *ipso facto* make Fuller the agent of the plaintiff. Yet Lord Ellenborough's explanation was accepted in *Yates* v. *Bell*, (1820) 3 B. & Ald. 643, and *De Bernales* v. *Fuller* was no longer worth citing.

[1] *Rogers* v. *Kelly*, 2 Camp. 123: *A* paid money to a bank to meet a specified bill; the banker's clerk by mistake paid that very money to *B* on another bill due from *A* to *B*. *A* could not succeed against *B*: "There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can." *B* could not be liable to *A* because (i) *B* did not receive to pay to *A*, (ii) *B* had received payment on a bill due from *A* to *B*.

[2] See note 2, p. 98.

[3] Winfield, *Province of Tort*, 134–8, has broken this ground.

[4] *Stevens* v. *Hill*, (1805) 5 Esp. 247, defendant informed plaintiff he would pay; "it was an appropriation". *Williams* v. *Everett*, (1811) 14 East 582, see p. 98 above; clear that communication by defendant to plaintiff is

(2) In several cases *C* has been unable to recover against *B* because *B* has been held to be the agent of *A* only; in all these cases there has been no appropriation by *B* to *C*.[1] It is tempting

essential, but not clear whether appropriation by defendant or contract is necessary. *Langston* v. *Corney*, (1815) 4 Camp. 176, drawee of bill of exchange declines to accept the bill, but promises holder to pay it if he receives funds on account of drawer; drawee received funds less than amount of bill; held that drawee is liable to holder; Gibbs, C.J., at p. 177, "the promise to pay... constituted a sufficient privity". *Stewart* v. *Fry*, (1817) 1 Moore C.P. 74, at original trial Gibbs, C.J., held there was "no undertaking" by defendant to retain money for alleged purpose; at a further hearing the court found for the defendant giving no reasons. *Scott* v. *Porcher*, (1817) 3 Mer. 652, *A* sent pearls to *B* for *B* to sell and pay proceeds to *C*; before *C* was informed of this *A* countermanded his instructions to *B*; held, no appropriation. *Robertson* v. *Fauntleroy*, (1823) 8 Moore C.P. 10, *per* Dallas, C.J., at p. 15, "the defendant consented to appropriate a part of the sum received". *Wedlake* v. *Hurley*, (1830) 1 Cr. & Jer. 83, *per* Vaughan, B., at p. 89, "To enable a party to recover in such a case, there must be an assent or agreement by the remittee to hold the bill or the proceeds for the plaintiff; and, for want of such a privity or assent, the present action must fail. The want of an express repudiation makes no difference, because the principle is, that there must be an assent." *Morrell* v. *Wootten*, (1852) 16 Beav. 197, *per* Romilly, M.R., at p. 202, "...where a person having money in the hands of another, directs him to pay it to a third party. In that case, if the holder or depositee consents so to do, and the direction is communicated to the third person, the thing is complete, and the payee can enforce the payment of the money", comparing an action for money had and received with an equitable assignment. *Moore* v. *Bushell*, (1857) 27 L.J. Ex. 3, no communication by the holder of the money; the court also pointed out that there was no contract between plaintiff and defendant, but did not suggest that a contract was essential. *Fleet* v. *Perrins*, (1868) L.R. 3 Q.B. 536, *per* Blackburn, J., at p. 542, "The money did not according to the rule in *Williams* v. *Everett* become the money of the person on whose behalf it was remitted until the depositee had by some act attorned to that person, up to which time it remained the money of the remittor (*sic*)."

[1] *Pinto* v. *Santos*, (1814) 1 Marsh. 132. *Gibson* v. *Minet*, (1824) 9 Moore C.P. 31, *A* instructs *B* to hold money at the disposal of *C*; before *B* credits *C* the order is countermanded by *A*, but *B* nevertheless credits *C*; held, by Best, C.J., on authority of *Williams* v. *Everett*, that *A* can recover from *B*; "up to this period [an appropriation by *B* to *C*] *B* is the agent of *A* only". *Stephens* v. *Badcock*, (1832) 3 B. & Ad. 354, on ground that *B* was agent of *A*, and also because there was no privity of contract. *Baron* v. *Husband*, (1833) 4 B. & Ad. 611, *per* Denman, C.J., at p. 613, "the defendant received money as the agent of [third persons] and not of the plaintiff...he would continue to be accountable to them [third persons] until he entered into some binding engagement with the plaintiff...". *Howell* v. *Batt*, (1833) 2 Nev. & M. K.B. 381. *Gray* v. *Kirby*, (1834) 2 Dowl. C.P. 601. *Cobb* v. *Becke*, (1845) 6 Q.B. 930. *Barlow* v. *Browne*, (1846) 16 M. & W. 126. *New Zealand Land Co.* v. *Ruston*, (1880) 5 Q.B.D. 474, *X* employs *Y* to sell wheat, *Y* employs *Z*, held by Field, J., that *X* could sue *Z* for proceeds; Court of Appeal, 7 Q.B.D. 374, reversed the decision because the statement of claim alleged that *Z* was agent of *X* and the jury had found that *Z* was not *X*'s agent.

to argue that an appropriation by *B* to *C* is only another way of saying that *B* must become *C*'s agent. This view does not appear in the cases, except in *Lilly* v. *Hays* (1836);[1] in this case *A* transferred money to *B*, later telling *B* that the money was to be paid to *C*; *B* informed *A* that he would pay it to *C*, and *C* was informed of this by authority of *B*. It was held that *C* could recover from *B*; Lord Denman, C.J., Williams, J., and Coleridge, J., all agreed that *B* by his admission became the agent of *C*.

(3) A few cases suggest that the defendant's liability rests on estoppel; the defendant received the money, or agreed to apply it, for the use of the plaintiff, and so he is estopped from denying that he holds money for that purpose.[2] Perhaps all the cases where "appropriation" has created liability could be explained on the basis of estoppel.

(4) Some cases lay down a rule that the plaintiff cannot succeed unless there is a contract between him and the defendant. This view probably arose from Lord Ellenborough's use of the

[1] 5 Ad. & El. 548.

[2] *Israel* v. *Douglas*, (1789) 1 H.Bl. 239, discussed on p. 95 above; at the date of this case estoppel by conduct was a recent doctrine in common law, H.E.L. IX, 161. *Fruhling* v. *Schroeder*, (1835) 4 L.J. C.P. 169, *A* consigned coffee to *B* to sell and remit proceeds to *C*; *C* enquired of *B* the probable amount that would be realised, and *B* replied that the coffee was not yet sold; Park, J., "the defendants cannot go back from what they have said". *Moody* v. *Spencer*, (1822) 2 Dow. & Ry. K.B. 6, is explained as estoppel in *Cobb* v. *Becke* (1845) 6 Q.B. 930; the latter case establishes that a London agent of a country solicitor is merely the agent of the country solicitor and not of the client, but in *Moody* v. *Spencer* it was decided that where a London agent receives money in the course of a suit from the other party, the client can sue the London agent; "It could not be ssid that the town agent received it to the use of the attorney in the country; and, as it was not received on his (the agent's) own account, it must be treated as received to the use of the client", 6 Q.B. at 936 *per* Denman, C.J. *Montagu* v. *Forwood*, [1893] 2 Q.B. 350, plaintiff employed *X* to collect from underwriters, *X* not being a broker employed defendant who was a broker; defendant collected from underwriters and set off the money received against a debt due from *X* to defendant. At first instance it was held that the plaintiff could not succeed for want of privity. In C.A. the only point discussed was the right to set off; that the plaintiff could succeed apart from the set off was taken for granted; presumably the explanation is the same as in *Moody* v. *Spencer*, above. *Bower* v. *Hett*, [1895] 2 Q.B. 337, in C.A., *per* Lord Esher, M.R., at 339, "That payment was made by [a third person] to the defendant in order that the money so paid might be handed over to the plaintiff.... The defendant must be considered to have taken the money so paid upon the terms on which it was paid; that is to say, as money received for the use of the plaintiff."

word "engagement" in *Williams* v. *Everett*, quoted on p. 98.[1] If the rule laid down so clearly in *Malcolm* v. *Scott*[2] is good law, there is no such thing as a quasi-contractual claim under the heading of this section.[3]

It is probable that the idea of a contract being necessary received strength from a confusion with the rules as to novation and non-assignability of choses in action at common law.[4]

(5) Here, as in all branches of our law, we have cases which merely purport to follow the doctrine of some previous case, and,

[1] *Stephens* v. *Badcock*, (1832) 3 B. & Ad. 354, "no privity of contract between the defendant and the plaintiff". *Baron* v. *Husband*, (1833) 4 B. & Ad. 611, at p. 614, the defendant "would continue to be accountable to [remitter of the money] until he entered into some binding engagement with the plaintiff to hold it for his use". *Lilly* v. *Hays*, (1836) 5 Ad. & El. 548; Patteson, J., at p. 550, considered that the only question was the alleged want of consideration moving from the plaintiff: "It is true that the rule of law requires such a consideration in all cases, though, in an action for money had and received, a direct consideration moving from the plaintiff is seldom shown." The rest of the court took a different view, see above, p. 101. *Brind* v. *Hampshire*, (1836) 1 M. & W. 365, Parke, B., at p. 372, explains that *Williams* v. *Everett* requires some "binding engagement entered into between the agent and the remittee". *Malcolm* v. *Scott*, (1850) 5 Exch. 601; Parke, B., at p. 610, "the defendants are under no obligation to pay over the money to the plaintiff, unless they have made a binding agreement with him to do so", and at p. 611, not "until they have bound themselves by a contract with the plaintiff to do so"; Alderson, B., Rolfe, B., and Platt, B., agreed. *Rustomjee* v. *The Queen*, (1876) 1 Q.B.D. at p. 494, suggests that *Williams* v. *Everett* requires a contract between plaintiff and defendant.

[2] Note 1 above.

[3] Winfield, *Province of Tort*, p. 137, suggests that such a rule seems "to put an end to any distinction between contract and quasi-contract". But the rule in *Malcolm* v. *Scott*, whether it is good law or not, relates only to certain types of claim for money had and received.

[4] This aspect of claims for money had and received is prominent in Bullen and Leake, 3rd ed. 1867, p. 45. Cases decided on this basis are: *Wharton* v. *Walker*, (1825) 6 Dow. & Ry., K.B. 288; an unsuccessful attempt was made to enforce the assignment of a chose in action. This also seems the explanation of *Jones* v. *Carter*, (1845) 8 Q.B. 134, although want of privity is the professed reason for finding for the defendant. In *Crowfoot* v. *Gurney*, (1832) 9 Bing. 372, novation was enforced by a claim for money had and received. *Walker* v. *Rostron*, (1842) 9 M. & W. 411, was an attempt to achieve assignment, and the court laid down the requirements for novation; hence the necessity for consideration. In *Hamilton* v. *Spottiswode*, (1849) 4 Exch. 200, a novation was enforced as express contract. As there must be a true contract for novation it does not matter whether the plaintiff declares on the novation or on a common count. An analysis of novation is given in *Griffin* v. *Weatherby*, (1868) L.R. 3 Q.B. 753, by Blackburn, J., at p. 758.

apparently on the assumption that the previous case gives a clear rule, contain no explanation of that rule.[1]

(6) An attempt has been made to construe the receipt of money to be applied for the benefit of the plaintiff as a technical trust, but without success.[2] If a technical trust is established, as it may be if other elements are present, the beneficiary can sue at common law for money had and received if the trustee admits that he has trust moneys in hand and appropriates a sum for the beneficiary;[3] the liability is contractual, the consideration being the precedent liability of the trustee in equity.

The above classification represents the main views that have been held, but the precedents are so contradictory and even unintelligible in some talk of "privity", that it is impossible to show any main line of development.

SECTION 27

The Liability of a Stakeholder

Medieval law provided that a person who had deposited money with a stakeholder to abide an event could not recover the money pending the event, and that on the happening of the event the money was held for the use of the person entitled, who could recover by action of account.[4] In the early eighteenth century indebitatus assumpsit was used instead of account, the transition taking place without argument or comment.[5] The stakeholder

[1] Two cases often cited are: *Yates* v. *Bell*, (1820) 3 B. & Ald. 643, where the judgment is simply that the case is indistinguishable from *Williams* v. *Everett*; *Robbins* v. *Fennell*, (1847) 11 Q.B. 248, *per* Denman, C.J., at p. 255, "There can be no recovery unless the law will imply a contract to pay on request from the relation which the several parties bear towards each other...." At p. 257, "As...we are driven to enquire where the legal liability resides, we cannot help saying, in conformity to former cases, and to the principle of *Williams* v. *Everett*, so often lately recognised, that it results from the privity existing between the parties."

[2] *Hill* v. *Royds*, (1869) L.R. 8 Eq. 290.

[3] *Edwards* v. *Lowndes*, (1852) 1 E. & B. 81, where earlier cases are cited.

[4] Pp. 26 and 31 above.

[5] *Asser* v. *Wilks*, (1707) Holt K.B. 36: "He that wins shall have indebitatus assumpsit against the stakeholder, for money received, because he received it to the use of the winner"; *Temple* v. *Welds*, (1715) 10 Mod. 315. No authority was cited in either of these cases. *Cowling* v. *Beachum*, (1823) 7 Moore C.P. 465, is reckoned the leading case.

is liable whether the deposit is made by both parties, there being an agreement between the parties, or by one party,[1] or by different parties who each agree with the stakeholder but have not agreed with each other.[2] The basis of liability may be contractual in some cases, but in others it must be quasi-contractual.[3]

A special rule governs the case where the stake is deposited to abide the result of an illegal transaction. If the event is determined, and the stakeholder has paid the winner, then the loser cannot recover any sum that he deposited;[4] but if the stakeholder has not paid over the money at the time when a demand for return of it is made, a depositor can recover against the stakeholder, whether or not the event has been determined. This rule was laid down in *Cotton* v. *Thurland* in 1793.[5] The arguments of counsel show that there was considerable confusion with cases where one party to an illegal contract sought to recover from the other party, but Lord Kenyon pointed out the distinction and disagreed with the only precedent that was really in point.[6] Ashhurst, J., gave as a reason for allowing recovery that the stakeholder does not hold for himself, and so must be answerable to somebody. Later cases confirm the rule in *Cotton* v. *Thurland*.[7] This rule might be thought to be an application of the principle that an agent must account for money he holds, even if he received the money on an illegal transaction, but historically it appears to be an independent rule, since the principles of an agent's liability formed no part of the *ratio decidendi* of the cases which established the rule.

[1] *Burrough* v. *Skinner*, (1770) 5 Burr. 2639, deposit paid to auctioneer.

[2] *Dowson* v. *Scriven*, (1789) 1 H.Bl. 218, entrance fees for a horse race formed the prize for the second place, recoverable against the steward of the course.

[3] Winfield, *Province of Tort*, 160.

[4] *Howson* v. *Hancock*, (1800) 8 T.R. 575.

[5] 5 T.R. 405.

[6] This was an unreported case decided at Nisi Prius by Wilson, J., in 1790, where it was held that such money was not recoverable.

[7] *Smith* v. *Bickmore*, (1812) 4 Taunt. 474; *Bate* v. *Cartwright*, (1819) 7 Price 540.

SECTION 28

Claims on an "Account stated"

We have seen (in sect. 9) that if a person who was accountable did account, then the sum found due was a true debt, for which action of debt was the only proper remedy. The old cause of action, i.e. the liability to account, was extinguished, since a man could not be made to account twice over. Naturally indebitatus assumpsit superseded action of debt.[1] It is impossible to say whether in these cases the defendant had been under a duty to account. There is reason to believe that ordinary indebitatus assumpsit lay only when there had been "accountability", which would create a true debt, and that the common count of insimul computasset was introduced to meet analogous cases where the accounting did not create a debt. In *Milward* v. *Ingram* (1675)[2] the court said that if *A* sells a horse to *B* for £10, there being other dealings between the parties, and they come to an account stated, and *B* is found in arrears £5, then *A* has insimul computasset, and not indebitatus assumpsit. In much the same way we have the development of quantum meruit claims; the facts are analogous to those which would create a debt, but there is no debt created, so that a quantum meruit and ordinary indebitatus assumpsit must be distinguished.

The distinction between the two cases, where the accounting creates a true debt and where it does not, was forgotten by the time of Blackstone. The reason for this was undoubtedly the decay of learning about the obsolete action of account. Blackstone explains that insimul computasset lies when merchants or other persons have settled their accounts together, "but if no account has been made up, then the legal remedy is by bringing a writ of account", a statement which taken together with his remarks about the action suggests that action of account could be brought against anyone with whom one had had dealings.[3]

The nomenclature used in *Milward* v. *Ingram*,[2] that is the

[1] *Whorwood* v. *Gybbons*, (1587) Gould. 48; *Egles* v. *Vale*, (1606) Cro. Jac. 69; *Dalby* v. *Cooke*, (1609) Cro. Jac. 234; *Colimore* v. *Jenson*, (1616) Moo. K.B. 854; *Bard* v. *Bard*, (1621) Cro. Jac. 602.

[2] 2 Mod. 43.

[3] Commentaries, III, 162.

contrasting of indebitatus assumpsit and insimul computasset, was not maintained, and Indebitatus Assumpsit became a generic name; the common counts are all grouped under it, whether or no there is a true debt.[1]

The advantages of suing on an insimul computasset were considerable. If a plaintiff wished to claim a balance, it was only necessary for him to declare on the accounting. He need not say anything about the items of the account. The form is obviously derived from the counts in debt on an informal "accounting with the plaintiff".[2] In 1628[3] an unsuccessful defendant moved in arrest of judgment that it was necessary for the plaintiff to specify the particular matters for which the account lay, but the whole court held that that was unnecessary, there being diverse precedents in favour of the simple declaration. The form of pleading has remained substantially the same.[4] It is interesting to compare the declaration on an insimul computasset with that on ordinary indebitatus assumpsit; the latter alleges that the defendant being indebted promised to pay, whereas the former alleges an accounting with the plaintiff and a sum found due in consideration thereof the plaintiff promised to pay that sum.[5] These pleading distinctions are fundamental, because they show what a plaintiff must prove, which really means his cause of action;[6] if indebtedness is pleaded as arising from money lent, then he must prove that money was lent, or if he claims on insimul computasset then he only proves the accounting.

If there have been various transactions between the parties, leading to a statement of accounts, it is obviously simpler for

[1] This is clear from Buller's *Nisi Prius*, 1781, p. 128. Blackstone uses the words Indebitatus Assumpsit only in discussing the action of debt, Comm. III, 154; claims for quantum meruit and quantum valebant he classified as species of assumpsit (simpliciter), Comm. III, 161 seq.

[2] See also p. 27, note 3 above. [3] *Homes* v. *Savill*, Cro. Car. 116.

[4] Vidian's Entries (1684) 45; Lilly (1741) 84; Bullen and Leake (8th ed. 1924) 82, which is the old form shorn of verbiage.

[5] Lilly 14 compared with 84. Similarly there is no allegation of indebtedness in a claim on quantum meruit. When an allegation of indebtedness is made, the plaintiff must specify the cause of debt; the reason is that indebitatus assumpsit would not lie for money due on a specialty, and it must appear from the declaration that a plaintiff has a possible case.

[6] For meaning of "cause of action", see note 1, p. 111.

the plaintiff to sue on an insimul computasset. In all the cases considered so far there was a genuine accounting, in the sense of there being sundry items which were brought in. The extension of insimul computasset to cover cases of admission of a single item did not take place until the beginning of the nineteenth century. There was little apparent need for such extension. If *A* is indebted to *B*, and then *A* admits he is so indebted, *B* has indebitatus assumpsit, the admission of *A* being superfluous. If there is no debt, then a quantum meruit or valebant or money had and received ought to cover the case. The explanation is undoubtedly this: there may be a debt due in conscience which is not due in law because the original transaction is unenforceable, and it was for admissions of such debts that the doctrine was invented. The first reported case is perhaps *Knowles* v. *Michel* (1811);[1] the plaintiff sold standing trees to the defendant, and after the defendant had cut down and removed the trees he admitted the agreed price. The contract being unenforceable because of the Statute of Frauds, the plaintiff pleaded an account stated. The defendant argued that an account stated implied different dealings between the parties, but Lord Ellenborough, C.J., said that he was in the frequent habit of receiving such evidence, and if there were an acknowledgment by the defendant of a debt due upon any account it was sufficient to enable the plaintiff to recover upon an account stated. Five years later this decision was cited and recognised as an authority for the proposition that admission of a single item is enough to ground an action for account stated.[2] The Statute of Frauds is fair game for anyone who has the ingenuity to devise safe ways of evading its clutches, but the ingenuity developed for that laudable purpose may be used for evasions which are less in favour. If an attorney fails to send in a signed

[1] 13 East 249.

[2] *Highmore* v. *Primrose*, (1816) 5 M. & Sel. 65. See also *Seago* v. *Deane*, (1828) 4 Bing. 459, where an account stated allowed a tenant to recover money due on an oral agreement in variation of a lease, in the face of an express defence of Statute of Frauds s. 4; Best, C.J., described the defence as "iniquitous", whilst Park, J., found it "wicked". In *Cocking* v. *Ward*, (1845) 1 C.B. 858, Tindal, C.J., approved of this decision.

bill of costs[1] or the money is really due under a deed[2] or on an illegal consideration,[3] then an admission of a debt will not ground an action on an account stated.

Soon after the recognition of this new type of account stated the courts had to decide whether it was necessary for the admission to have been made to the plaintiff or his agent. In *Ashby* v. *Ashby* (1829)[4] the plaintiff counted on a promissory note, which turned out to be invalid, and also on an account stated in an admission by defendant to a third person that he owed the money, and the court held that that was sufficient. This view was soon reversed.[5] A further point was whether the admission must be accepted by the plaintiff, a question which was not settled until the Court of Appeal gave an affirmative answer in 1888.[6] It will be observed that neither of these questions could arise when an account stated meant a real settlement of accounts between the plaintiff and the defendant or their agents; the courts did not appreciate that account stated had come to mean two different things.[7] The old account stated was generally a contract, whilst the mere admission was given a spurious resemblance to contract by the development of these two rules.

Fortunately the House of Lords has stated the law with some clarity in *Camillo Tank S.S. Co. Ltd.* v. *Alexandria Engineering Works* (1921).[8] Viscount Haldane (at p. 137), Viscount Finlay (at p. 141) and Lord Phillimore (at p. 146) took substantially

[1] *Scadding* v. *Eyles*, 9 Q.B. 858.

[2] *Middleditch* v. *Ellis*, (1848) 2 Exch. Rep. 623, contains most of the law on this topic. This is comparable to the attempts to use indebitatus assumpsit for arrears of rent; after indebitatus assumpsit had been tried and not allowed (*Reade* v. *Johnson*, (1591) Cro. Eliz. 242) plaintiffs tried insimul computasset, without complete success, *Ayre* v. *Sils*, (1648) Sty. 131.

[3] *Kennedy* v. *Broun*, (1863) 13 C.B. n.s. 677.

[4] 3 Moo. & P. 186. In *Bishop* v. *Chambre*, (1827) 3 Car. & P. 55, the court was doubtful.

[5] *Breckon* v. *Smith*, (1834) 1 Ad. & El. 488; *Bates* v. *Townley*, (1848) 2 Exch. *per* Parke, B., at p. 156: "It is settled that there cannot be an account stated by a defendant except with the plaintiff or his agent."

[6] *Grundy* v. *Townsend*, 36 W.R. 531.

[7] In *Lubbock* v. *Tribe*, (1838) 3 M. & W. 607 at 612, Lord Abinger, C.B., complained that "there is a good deal of confusion in the books on questions of accounts stated,—not the older books, but the modern ones".

[8] 38 T.L.R. 134.

the same view: (i) An admission that a sum is due gives a separate cause of action, but the admission is not conclusive, and the debt charged can be disputed in any ordinary way; (ii) Where there has been agreement for consideration, then that agreement is like any other agreement, and can only be disputed on grounds which affect the validity of contracts in general. Viscount Cave (at p. 143) recognised three cases: (i) A mere admission, as in the other speeches; (ii) Where items of claim are brought into account on either side and a balance is struck, making a contract; (iii) Where a claim is accepted as correct for valuable consideration, this also being a contract. Lord Shaw of Dunfermline (at p. 145) is not very clear: (i) Is much like this class in the other speeches; (ii) When cross accounts are balanced, then consideration operates against and in favour of both parties, but the contract is less conclusive than an ordinary contract, since an item can be disputed, but estoppel will reduce the effect of this; (iii) An account settled can only be challenged on grounds which would justify rescission of a regular agreement. Unfortunately he does not distinguish between (ii) and (iii) with any clarity; the only difference seems to be whether the contract is executory or executed, which surely ought to be irrelevant.

Dealing first with the mere admission of liability, not amounting to a contract, it must be taken as good law that it is "a cause of action", although the practical effect is to do no more than establish a *prima facie* case, leaving the defendant entitled to dispute the obligation he has admitted. This means that the admission creates nothing more than a presumption: a plaintiff wins either on a presumption of a preceding liability, or, if the presumption is rebutted, by proving the liability. This suggests that it is no more than a rule of evidence, although the matter could perhaps be better treated under the heading of "Pleading". If a plaintiff is relying on an admission then he must plead it, whilst if he relies on an obligation which has been admitted he must plead that obligation[1] (and not the admission, for that would be pleading evidence). There is much reason in this, as a pleading rule, since a defendant is entitled to know what his

[1] Rules of the Supreme Court, O. xx, r. 8.

adversary is claiming. In the majority of these cases it is simplest to regard the liability as arising from the original source of obligation, and say that an action on the admission is merely a rule of evidence or pleading. The only objection to this course is that there are some cases where the liability admitted could not itself be enforced,[1] and here the admission is "a cause of action" in a more worthy sense. It is quite possible to regard all these cases as contracts, the consideration being the precedent liability,[2] a course which is unobjectionable to those who care for historical links but a great stumbling-block for everyone else. On the whole I think it is better to regard this form of account stated as resting on a pleading rule (giving special treatment to some cases[1]) than to base it on a form of contract which grows less intelligible as the forms of action become more reconciled to their grave. On either explanation it appears that we need not invoke quasi-contract.

When there have been items of claim on both sides and a balance has been struck there is a normal contract supported by consideration.[3] There is really no reason for calling such claims quasi-contractual. The liability arises because the defendant has expressly or impliedly (in fact) promised to pay a sum of money for valuable consideration. Viscount Cave[4] made a distinction between insimul computasset and a claim agreed for valuable consideration, recognising that both are contracts resting on consideration. It thus appears that accounts stated are either admissions or contracts. The latter should be discussed within the body of contract law, perhaps the most convenient place being in proximity to Accord and Satisfaction.

The chief reason why accounts stated cause difficulty to-day is through the rule that they constitute a "cause of action".[5] But a claim for the price of goods sold and delivered is equally

[1] E.g. because of the Statute of Frauds, p. 107 above. Or an equitable liability may be transmuted, as in *Howard* v. *Brownhill*, (1853) 23 L.J. Q.B. 23.

[2] Salmond and Winfield, *Contract*, s. 25.

[3] Well expounded by Blackburn, J., in *Laycock* v. *Pickles*, (1863) 4 B. & S. 506, cited with approval by Viscount Cave in *Camillo* case, at p. 143.

[4] *Camillo Tank S.S. Co. Ltd.* v. *Alexandria Engineering Works*, (1921) 38 T.L.R. at p. 143.

[5] Rules of the Supreme Court, O. xx, r. 8, discussed p. 109 above.

a "cause of action";[1] it only means that a pleader need not set out the terms of the original transaction[2] since the substance of the plaintiff's claim is indicated by the use of technical words.

SECTION 29

The Duties of an Agent

Whilst most of the rights and duties of an agent rest upon contract it is generally admitted that agency may exist apart from contract, and that, whether a particular agency rests on contract or not, some of the obligations of the agent are hardly contractual. I have selected a few topics where it appears desirable to see if the present law is dependent on ancient foundations. On the whole the modern law appears to rest on cases of the late eighteenth or earlier nineteenth century; the whole conception of agency would of course require a deeper search, but it is unlikely that it would throw light upon the character of these particular forms of liability.

(1) Breach of warranty of authority

There is very little early authority; a few cases suggest that an agent who is unauthorised or exceeds his authority is personally liable, but no form of action is specified.[3] In *Polhill* v. *Walter*[4] in 1832, the defendant had accepted a bill as agent of the drawee when he knew that he was unauthorised. The defendant was held liable to an indorsee by action on the case in deceit; no authority was cited except on the scope of deceit as a tort. According to Lord Tenterden, C.J.: "If the defendant had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney supposed to be genuine, but which was in fact a forgery, he would have

[1] A "cause of action" is defined by Lord Esher, M.R., as "every fact which it would be necessary for a plaintiff to prove if traversed, in order to support his right to the judgment of the court", in *Read* v. *Brown*, (1888) 22 Q.B.D. 131, C.A.

[2] The word "contract" does not usually appear in pleadings on a claim for price of goods sold, yet everyone would agree that the plaintiff pleads a contract.

[3] *Parrott* v. *Wells*, (1690) 2 Vern. 127 (Chancery); *R.* v. *Addington*, (1755) Sayer 259; *East India Co.* v. *Hensley*, (1794) 1 Esp. 112; *Bowen* v. *Morris*, (1810) 2 Taunt. 374, where counsel suggests the remedy would be "ex delicto". B. & Ad. 114.

incurred no liability, for he would have made no statement which he knew to be false." According to the old view of deceit it was not always essential to liability for the defendant to have known that his statement was false, for deceit covered the breach of an express warranty.[1] There had been a tendency to break down the rule that the warranty must be express, and a possible line of development would have been to regard an agent as giving a tacit warranty of authority and allow deceit to lie for its breach,[2] but by this time it had become the practice to allege breach of warranty in an action on the contract,[3] thus obscuring a practice which might have given useful results.

The appearance of the *Law of Agency* by Story, the English edition being published in 1839, marks a change of opinion. Story states the law thus: "Whenever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal."[4] The English authorities he cites for this proposition[5] are barely adequate, and one of these, *Polhill* v. *Walter*,[6] is contrary to his proposition in so far as it lays down that there is no remedy where the agent mistakenly thinks that he has authority; Story disputed this latter rule,[7] pointing out that a person dealing with a professed agent is equally damaged whether the agent knows or does not know of his lack of authority. Despite the weakness of his English authorities, Story's views were accepted by our courts and his book was accorded the recognition usually reserved for the more venerable English texts.[8] It took our courts a few years to settle the appropriate form of action. At first the view prevailed that the agent should

[1] *Chandelor* v. *Lopus*, (1603) Cro. Jac. 4.

[2] Street, *Foundations of Liability*, 1, xxviii, discusses the bearing of the old law of breach of warranty on the modern law of deceit.

[3] *Stuart* v. *Wilkins*, (1778) 1 Doug. 18, shows that this had been the practice for some years before the date of that case.

[4] Story, *Law of Agency*, p. 226.

[5] The cases in notes 3 and 4, p. 111 above, except *R.* v. *Addington*.

[6] 3 B. & Ad. 114.

[7] Story, *op. cit.* at p. 226, n. 3.

[8] In *Jones* v. *Downham*, (1842) 4 Q.B. 235, in Exch. Ch. 7 Q.B. 103, and in *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, the Bench cited Story with approval, requiring no further authority.

be sued as principal on the contract he had made.[1] This opinion was soon rejected, the court refusing to allow an agent to be so sued in a case in 1849.[2] In *Lewis* v. *Nicholson* (1852)[3] Lord Campbell, C.J., said: "I think in no case where it appears that a man did not intend to bind himself, but only to make a contract for a principal, can he be sued as principal, merely because there was no authority. He is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not." The hint given here as to the form of action was followed in the leading case of *Collen* v. *Wright* in 1857,[4] where the defendant's testator had made a contract as agent mistakenly supposing that he had authority. The action was of course framed on an implied contract to avoid the legal effects of the death of the agent. At the original trial and in the Exchequer Chamber the action was upheld, the Bench basing the decision on general principles and not on specific authority.[5] This ruling has not been disputed, and it forms the basis of the modern law.

(2) Money paid by mistake, or paid under compulsion, to an agent

In some cases money is paid by a third person to an agent in circumstances where the third person is entitled to recover it as

[1] Some unreported authority is given in a note to *Thomas* v. *Hewes*, (1834) 2 C. & M. at 530, note a. *Jones* v. *Downham*, (1842) 4 Q.B. 235, appears to make an unauthorised agent liable as principal, but the case is not clear since the document signed by the agent admitted of that construction; the reversal in Exch. Ch., 7 Q.B. 103, was upon technical grounds. *Polhill* v. *Walter*, cited above, contained a count against the defendant as acceptor of the bill; that point was shortly dismissed, as turning upon the rule that only the drawee or acceptor for honour can become acceptor. *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, *per* Alderson, B., at 9, an unauthorised agent who *bona fide* thinks he has authority is liable, but no form of action is suggested; here it was held that an unauthorised agent was not liable as she could not have known that her authority was terminated, but this is overruled by *Yonge* v. *Toynbee*, [1910] 1 K.B. 215.

[2] *Jenkins* v. *Hutchinson*, (1849) 13 Q.B. 744.

[3] 18 Q.B. 503, disapproving the note to *Thomas* v. *Hewes* cited note 1 above.

[4] 7 E. & B. 301, affirmed in Exch. Ch. 8 E. & B. 647.

[5] The dissenting judgment of Cockburn, C.J., at 658, is based on the precedents; he argues that it had been thought that an agent could be liable as a principal, that that view was exploded, and therefore there was no liability where deceit would not lie.

money paid or money had and received. The question then arises whether the action should be brought against the agent or against the principal.

Until the time of Lord Mansfield there appears to have been no settled rule. In *Jacob* v. *Allen* (1703)[1] an administrator gave the defendant authority to collect money owing to the intestate, and the defendant collected such money and handed it to the administrator; a will was then found, and the executor successfully sued the defendant for money had and received to his use. In a similar case, *Pond* v. *Underwood* (1705),[2] it was held that the executor could not recover against the agent but must sue the administrator. Each case receives some support from a subsequent case.[3] The former case was disapproved by Lord Mansfield,[4] and in the case of *Buller* v. *Harrison* (1777)[5] he laid down the general rule that the agent is liable if he has not paid it over to his principal when demand for repayment is made, but that if before demand the agent has paid it over, or given new credit to his principal, or accepts bills, or is otherwise prejudiced, then the action should be against the principal. The decision was made without reference to precedents. In *Stevenson* v. *Mortimer* (1778)[6] Lord Mansfield states the rule as if it was always a defence for an agent to prove that he had handed the money over, but as he cited his previous decision in *Sadler* v. *Evans*[4] he presumably intended to keep the qualification there mentioned, that the agent must have paid before demand made, and must not have acted *mala fide*; the latter point does not appear to have influenced subsequent cases, although it contains the gist of a rule worked out independently some years later.

The rule in *Buller* v. *Harrison* has been followed, subject to an important rule introduced by *Snowdon* v. *Davis* in 1880.[7] Here a bailiff, acting in excess of his authority, received money under threat of a distress, and paid the money to the sheriff. It was held that the payer of the money could recover from the

[1] 1 Salk. 27. [2] 2 Ld. Raym. 1210.

[3] *Cary* v. *Webster*, (1721) 1 Str. 480, decides that a servant is not liable when he has handed money received over to his master. *Jacob* v. *Allen* was approved in *Att.-Gen.* v. *Perry*, (1733) 2 Comyn 481.

[4] In *Sadler* v. *Evans*, (1766) 4 Burr. 1984.

[5] 2 Cowp. 565. [6] 2 Cowp. 805. [7] 1 Taunt. 359.

bailiff. The case was distinguished from *Buller* v. *Harrison* and similar cases, on the ground that there the money was paid to the agent for the use of the principal, whereas here the money was paid for the redemption of goods and not for the bailiff to pay it over to anyone. Later cases uphold *Snowdon* v. *Davis*, stating the rule in another form: that an agent is personally liable when payment is made under compulsion.[1] Presumably an agent must always be personally liable if his act was tortious, whether the action is framed in tort or on waiver of tort.

(3) Money received by an agent under an illegal contract

When an agent receives money for his principal on a contract that is illegal, the principal can generally recover from the agent by action for money had and received. The point does not appear to have arisen until *Tenant* v. *Elliott* in 1797;[2] in that case the defendant, as broker, effected an illegal insurance for the plaintiff and subsequently received payment on a loss from the underwriter. Buller, J., held that the defendant must pay over to his principal, deciding the case, without precedents, on the broad basis that the underwriter could not recover and clearly the defendant could not in conscience keep the money. In *Farmer* v. *Russell* (1798)[3] this decision was discussed on the proposition that if *B* gives money to *A* for the use of *C*, then *C* can recover from *A* even if the consideration on which *B* paid the money is illegal. The case differs from *Tenant* v. *Elliott*, because there the defendant was the agent of the plaintiff, but in subsequent cases both precedents have been approved as if the latter case merely reinforces the earlier precedent.[4]

The main rule has been undoubted since *Tenant* v. *Elliott* that an agent who has received money from a third person cannot set up the illegality of the transaction against his own

[1] *Oates* v. *Hudson*, (1851) 6 Exch. 346, money paid to obtain deeds wrongfully detained; *Parker* v. *Bristol and Exeter Ry. Co.*, (1851) 6 Exch. 702, excess rail charges paid under protest; *Steele* v. *Williams*, (1853) 8 Exch. 625, illegal charges extorted *colore officii*.

[2] 1 Bos. & Pul. 3. [3] 1 Bos. & Pul. 296.

[4] They are so treated in *Bousfield* v. *Wilson*, (1846) 16 M. & W. 185, and *Nicholson* v. *Gooch*, (1856) 5 El. & Bl. 999.

principal. Some difficulty arises as to qualifications of the rule. Where *A*, *B* and *C* form an illegal partnership for insurance, *A* underwriting the policies, and *C* and *D* acting as brokers, it was held that *A* could not recover money received by *C* as premiums; the decision turned on the fact that the money was received not for *A* but for *A* and his partners, and they could not recover without pleading their own illegal partnership.[1] In *M'Gregor* v. *Lowe* (1824)[2] the plaintiff claimed money in the hands of his agent, the agent having been employed to raise a loan which purported to be for the use of Poyais State; the plaintiff was asked to prove the existence of Poyais, and on his failure to do so the case was dismissed, Abbott, C.J., saying that he refused to assist "the parties to a mere bubble to deceive the public".[3] *M'Gregor* v. *Lowe* was explained by Crompton, J., in *Nicholson* v. *Gooch*[4] on the ground that the "receipt was illegal, and part of an illegal transaction in which both the principal and the agent were concerned". It can rarely happen that a receipt is illegal; Crompton, J., pointed out that ordinarily it is not illegal to pay or receive money on a void or illegal contract, and in the case before him the receipt was illegal only because statute had prohibited paying or receiving money on Stock Exchange "differences".

The basis of the rule in *Tenant* v. *Elliott* is that the action does not rest on enforcement of an illegal contract but on the receipt of money by the agent to the use of the principal. The principal however cannot recover if: (i) he must plead his own illegal contract (*Booth* v. *Hodgson*[1]), or (ii) the court is in reality asked to support a fraud (*M'Gregor* v. *Lowe*[2]) or to disregard a statutory provision (*Nicholson* v. *Gooch*[4 5]).

[1] *Booth* v. *Hodgson*, (1795) 6 T.R. 405.

[2] Ry. & Mood. 57.

[3] The same idea appears in *Catlin* v. *Bell*, (1815) 4 Camp. 183, where the defendant had received goods to sell abroad and refused to account because he said the goods had not paid export duty; the court held that no excuse, unless it was proved that evasion of duty was part of the agreement between the parties.

[4] 5 El. & Bl. at 1016.

[5] Halsbury, *Laws of England*, 2nd ed. 1, s. 421, says that money can be recovered from an agent "provided that the agency itself is not illegal"; this may be correct, but it is hardly the *ratio decidendi* of the cases cited.

(4) Agency of Necessity

The agency of necessity that may arise in a wife, a carrier, or a shipmaster may perhaps be considered quasi-contractual, although in the two latter cases it is perhaps merely an implied term of their employment. These topics are historically so bound up with the whole law of husband and wife, carriers, and maritime law that it is not possible to isolate the history of certain types of action.[1] In any restatement of our law it is unlikely that there could be any advantage in separating these claims from the main body of law to which they are allied.

SECTION 30

The basis of claims for money had and received and money paid

The historic basis of these claims is a promise implied by law; the promise has been a fiction since the latter part of the seventeenth century. To say that a promise implied by law (i.e. a fictitious contract) is the basis of the action is liable to be misunderstood. A comparison is useful. The liability of a purchaser of land to be affected by some pre-existing interests in the land may depend upon notice, actual or constructive; "notice" is the basis of the liability. The law may impute notice to a purchaser, but the rules for deciding when a person has constructive notice are altogether separate from the rules as to the effect of notice. So in the matter of contracts implied in law. The basis of the action is a contract implied in law, and that principle must not be confused with the separate question of when a court will imply a contract. It is sometimes thought that Lord Mansfield in *Moses* v. *Macferlan*[2] altered the basis

[1] As regards the wife, this is clearly shown in the notes to *Manby* v. *Scott* in 2 Smith L.C.

[2] (1760) 2 Burr. at 1008. This case is generally cited as it contains the clearest statement of Lord Mansfield's views. Similar language was used in *Sadler* v. *Evans*, (1766) 4 Burr. at 1986: "It is a liberal action, founded upon large Principles of Equity, where the Defendant cannot conscientiously hold the Money." *Dale* v. *Sollet*, (1767) 4 Burr. at 2134: "The Plaintiff can recover no more than he is in Conscience and Equity entitled to." *Jestons* v. *Brooke*, (1778) 2 Cowp. at 795: "This is an action for money had and received; and therefore it is analogous to a bill in equity....The general question is...whether it is against conscience that the defendant should retain the whole profits...."

of the action by introducing a theory of *aequum et bonum* to replace the theory of a contract implied by law. Professor Winfield has taken this view,[1] maintaining that Lord Mansfield introduced a new theory which more or less held the field until in 1914 *Sinclair* v. *Brougham*[2] marks a return to the theory of implied contract. Mr Landon, in criticising Professor Winfield's views,[3] seems to find a return to implied contract at a much earlier date, citing *Marriott* v. *Hampton* in 1797[4] as the turning point. Dr Hanbury had taken a similar view; he says of *Moses* v. *Macferlan* that Lord Mansfield "postulating that an action of *assumpsit* will lie in many cases where debt lies, and also in many cases where it does not lie, he goes on to overrule the second objection that no *assumpsit* lies, except upon an express or implied promise, with the following answer: 'If the defendant be under an obligation, from ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract.' These last six words might have saved the authority of the case; but it is, unfortunately, quite plain that Lord Mansfield regarded the fiction of contract only as an interesting parallel to the relationship required in an action for money had and received, and not as an essential ingredient of it. Or, to give another interpretation of his thought, he has fallen into the way of regarding contract and quasi-contract as interchangeable terms, and extending the latter term to cover positions which have nothing in common with contract at all."[5] It is doubtful whether these views are correct. The "second objection" referred to was: "That no Assumpsit lies, except upon an express or implied Contract: But here it is impossible to presume any contract to refund Money, which the Defendant recovered by an adverse suit."[6] Lord Mansfield's answer,[7] quoted by Dr Hanbury, is not an

[1] Winfield, *Province of Tort*, at 127; of Lord Mansfield's decisions: "On the whole, however, it was a great improvement on the theory of fictitious contract which had preceded it"; at 134, "A much more serious question is whether the whole doctrine [*aequum et bonum*] has not been uprooted and replaced by the older theory of a contract implied by the law...."

[2] [1914] A.C. 398, discussed at p. 119 below.

[3] *Bell Yard*, VIII, p. 27.

[4] 7 T.R. 269.

[5] L.Q.R. XL (1924), p. 35.

[6] 2 Burr. at 1008.

[7] Lord Mansfield dealt with the point about the effect of a previous suit in his answer to the third objection where the same point was pleaded generally without mention of any form of action.

overruling of the proposition that assumpsit requires an express or implied contract; it is an admission of that proposition. Lord Mansfield explained that where "natural justice" requires it, "the law implies a debt, and gives this action", that is indebitatus assumpsit. Lord Mansfield's doctrines are often reproduced by Blackstone, where we find: "A Third species of implied assumpsits is... where the defendant has received money which *ex aequo et bono* he ought to refund."[1] Practice books give the same doctrine. Buller's *Nisi Prius*[2] tells us concerning indebitatus assumpsit: "There must be either an express or implied promise to found this action upon", and gives various examples including "Moses v. Macferlan".

The *aequum et bonum* theory was not the basis of the action, but the basis for deciding when the law will imply a contract. Adopting the language used by Salmond for describing sources of law[3] we can say that *aequum et bonum* was the material source of the obligation, but that the formal source was a contract implied by law.

As far as I know the theory of a contract implied in law (as the formal source) has been challenged only in cases where there was difficulty in implying a contract on the ground that the defendant could not *in law* have made such a contract. Difficulty has arisen from the liability of lunatics, drunkards, and infants to pay for necessaries. According to Cotton, L.J., *In re Rhodes* in 1890,[4] the law implies an obligation on any person who cannot contract, to pay for necessaries, but the implied obligation is not an implied contract. The matter has been put upon a statutory basis by the Sale of Goods Act, 1893, s. 2, and is no longer of forensic interest. Another form of disability arises through the *ultra vires* rule for corporations. The decision of the House of Lords in *Sinclair* v. *Brougham* (1914)[5] is a logical application of principles which have been accepted (apart from doubts mentioned earlier in this paragraph) for over 250 years. Lord Sumner said: "All these causes of action are common species of the genus assumpsit. All now rest, and long have rested,

[1] Bl. Comm. (1768), III, 162.
[2] (1781) p. 129.
[3] Salmond, *Jurisprudence*, chap. VI.
[4] 44 Ch. D. at 105.
[5] [1914] A.C. 398.

upon a notional or imputed promise to pay."[1] In this case the court had to decide whether a promise to pay could be imputed where moneys had been deposited with the "Birkbeck Bank" under a contract that was *ultra vires*, and it was held that a promise could not be imputed. "To hold that a remedy will lie in personam against a statutory society, which by hypothesis cannot in the case in question have become a debtor or entered into any contract for repayment, is to strike at the root of the doctrine of ultra vires....That doctrine belongs to substantive law...and cannot be made different by any choice of form in procedure".[2] The sole effect of this decision is to establish a rule that the courts will not imply a contract in circumstances where an express promise could not be valid:[3] "The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid".[1]

When will the courts imply a contract? If we look at the pre-Mansfield use of indebitatus assumpsit, all we can say is that the courts have given a remedy (i.e. implied a contract) in various specified circumstances. It is probably impossible to find any theory used by the judges in deciding when to imply a contract. There are some grumbling remarks of Holt, C.J., that he disapproved of some extensions of indebitatus assumpsit but would give way to precedent.[4] And there is the dictum of Treby, C.J.: "That where a man pays money on a mistake in an account, or where one pays money under, or by, a mere deceit, 'tis reasonable he should have his money again."[5] But

[1] [1914] A.C. at 452.

[2] *Per* Viscount Haldane, L.C., at 414.

[3] The decision in *Sinclair* v. *Brougham* may cause difficulty. I imagine that an unconscious man cannot contract; suppose a doctor attends an unconscious man at the request of the man's infant son; can the doctor recover on a contract imputed to the patient? But the incapacity here may be regarded as *de facto* only. However, the court in *In re Rhodes*, above, was shaking off fetters; *Sinclair* v. *Brougham* is a logical outcome of accepted principles, and regrets at the decision must be regrets that their lordships followed the law instead of inventing a more sensible rule.

[4] *City of York* v. *Toun*, (1700) 5 Mod. 444, 1 Ld. Raym. 502; *Starke* v. *Cheeseman*, (1700) 1 Ld. Raym. 538, Salk. 128; *Holmes* v. *Hall*, (1704) 6 Mod. 161.

[5] *Tomkins* v. *Bernet*, (1693) Salk. 22. The report of this case was much criticised by Lord Mansfield in *Smith* v. *Bromley*, Doug. 697, 1 Cowp. 200.

the reports until Burrow do not spare space for giving more than the technical reasons for allowing or disallowing actions. In *Moses* v. *Macferlan* (1760)[1] we get a general proposition: a contract will be implied when the principles of natural justice require that the defendant refund money. As Professor Winfield has pointed out, "the phrases 'natural justice' and '*ex aequo et bono*' were a source of confusion in one direction and were difficult for judges to apply in another", and he has traced the confusion with technical equity and the effects of the vagueness of the phrases[2]. Lord Mansfield's proposition was "pruned". The history of this pruning is best shown in the preceding sections which describe the gradual settlement of rules as to when a remedy is available. A good example of the judicial process in this sphere is *Marriott* v. *Hampton* (1797).[3] This case can be cited to show that a contract will not necessarily be implied when *ex aequo et bono* money should be restored. If, however, Lord Mansfield had spoken of "public policy" and "what is reasonable" instead of using the oratorical flourishes of his day, we should describe *Marriott* v. *Hampton* as a logical development of his views: public policy requires ill-gotten gains to be restored, but it also requires finality in lawsuits, and if these propositions occasionally conflict the problem is to choose between them; the principle of public policy is vindicated whichever choice is made.

The process of "pruning" has also produced some doctrines of doubtful utility. The worst instance is the introduction of the notion of "privity", for this term appears to be unintelligible.[4] But it is important to note that "privity" has never been considered an ingredient of all claims for money paid or money had and received. The notion has been confined to two types of claim: where the plaintiff has been compelled to pay money which should have been paid by the defendant, and where money has been received by the defendant from a third person

[1] 2 Burr. at 1008.

[2] Winfield, *Province of Tort*, 128 et seq. I am in agreement with this analysis, except for the underlying assumption that "implied contract" was abandoned and replaced by another theory.

[3] 7 T.R. 269; this case is discussed above at p. 68 et seq.

[4] See pp. 55 and 97 et seq. above.

for transmission to the plaintiff; in the former the authorities leave little reason for us to believe that "privity" has ever been necessary, whilst in the latter the precedents are very uncertain.[1] Hence the confusion caused by "privity" has only affected part of our subject; the notion has not in any way affected the basis of indebitatus claims.

The course of development of other branches of our law has been a process of admitting new types of claim and working out detailed rules. Examples of cases which state general propositions followed by cases which qualify the general doctrine are numerous.[2] Claims on indebitatus counts are not exceptional; our ordinary judicial process has moulded the law. "What is fair and reasonable" is an important point for the court to consider when the law is doubtful or there is no authority, whether the claim sound in quasi-contract or any other branch of law. A systematic exposition of the material sources of our case law at different periods would be a history of the material sources of law in general, and be nearly a Universal History. Dicey's task in *Law and Opinion* would have been herculean if he had dealt with case-law instead of legislation. There seems no reason for concentrating attention upon the material sources of quasi-contract, except in so far as we must consider material sources of all our law. There can be no simple answer to the question when our courts will imply a contract: they will do so in a new type of case when the judges see fit, applying the usual judicial process.

The contract that is implied is of course a fiction, a purely dogmatic fiction; it can be formulated as: "The defendant is to be treated *as if* he had made a contract with the plaintiff...." For instance, in waiver of conversion we treat the defendant as if he had been authorised to dispose of the plaintiff's property. The fiction is merely a thought device. There is a tendency to assume that a fiction is an evil, but this arises from lack of pre-

[1] See p. 55, and sect. 26 above. Winfield, *Province of Tort*, 134, 140, 141, implies that "privity" has been thought essential in all cases; see note 3, p. 102 above. I do not know of any cases which suggest that "privity" is essential except in the two classes of case we mention.

[2] E.g. *Kynaston* v. *Moore*, (1627) Cro. Car. 89, that trover will lie for a wrongful taking, is qualified by *Fouldes* v. *Willoughby*, (1841) 8 M. & W. 540.

cision in language. Lawyers, like mathematicians and others, are at liberty to make their own concepts, and if their concepts sometimes bear little relation to "reality" that need not affect the validity of their results. If we take the sequence: motorist—pedestrian—accident—reasonable man—damages, we are using the fiction of "a reasonable man" to measure the behaviour of the parties. The validity (or utility, if that is preferred) of the result is not affected by the fact that "a reasonable man" is a lawyer's concept, a creature of the imagination. So in the sequence: money paid by mistake—fictitious contract—money refunded, the fictitious contract is an innocuous concept. In both instances the fiction is introduced and then eliminated, as mathematicians introduce and then eliminate various quantities; the "reality" of the concept introduced is immaterial provided we eliminate it before announcing the result. The important thing to realise is that the contract implied is a fiction and not a hypothesis or supposition of fact; for the latter it would be relevant to discuss the absurdity of imputing a contract in many cases, whilst for a fiction the only question is as to its utility, not its "reality". We cannot condemn a fiction just because it is a fiction.[1]

The technique of "fictitious contract" is, however, open to serious objection. First, we can get the result we want without this fiction; the present process is akin to using algebraic formulae to solve problems of simple mental arithmetic. Second, the use of "fictitious contract" means that some of the limitations of contract are applied to quasi-contract, and there is no apparent reason for thinking that that is desirable. The law of contract may well provide that the agreements of persons, or of particular persons such as corporations, should take certain forms or have certain limits if they are to be enforced, whereas such forms or limits should not necessarily apply to obligations imposed by law. *Sinclair* v. *Brougham*,[2] discussed above, shows the results

[1] The whole topic of fictions requires far more attention at the hands of lawyers. The view given here is based on Vaihinger, *Philosophy of "As If"*. Perhaps the best discussion of these ideas in the realm of law is in Jerome Frank, *Law and the Modern Mind*.

[2] [1914] A.C. 398. It should be noted that the inconvenience of the decision on the claim on an implied contract was circumvented by applying the equitable remedy of a Tracing Order.

of applying the concept of contract; the court could have come to no other conclusion without violating the premiss on which the action rested.

SECTION 31

Is Quasi-Contract in English law co-extensive with the old Indebitatus counts?

The following points must be considered:

(1) Maritime salvage can rightly be classified as quasi-contractual.[1] The whole topic of maritime salvage stands outside the realm of common law, both in its history and in its present form.[2] I have found nothing to show that the rules of maritime salvage have exercised any influence on matters dealt with at common law. The principle of *negotiorum gestio*[3] does not exist in our law. Bowen, L.J., contrasted maritime salvage and common law, saying of the latter: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure."[4] The position of trustees and mortgagees is of considerable practical importance. A trustee has a right to reimbursement and indemnity for expenses properly incurred about the trust property; the right, which is now statutory,[5] has been regarded as part of the general law of trusts.[6] The security of a mortgagee is held not only against the principal debt and interest but also against any proper expenses of the mortgagee in relation to the debt or security and costs of any

[1] Winfield, *Province of Tort*, 139, 155.

[2] Gutteridge, *The Doctrine of Unjustified Enrichment*, Camb. L.J. (1934), v p. 224.

[3] Buckland, *Text-book of Roman Law*, 2nd ed., p. 537.

[4] *Falcke* v. *Scottish Imperial Insurance Co.*, (1886) 34 Ch. D. 234, at 248. This case contains a review of the cases on payment of premiums to prevent policies from lapsing. At p. 249 Bowen, L.J., explained that to recover for a voluntary service "you must have circumstances from which the proper inference is that there was a request to perform the service".

[5] Trustee Act, 1925, s. 30 (2).

[6] *Hardoon* v. *Belilios*, [1901] A.C. 118, *per* Lord Lindley at p. 123.

proper litigation; this appears to rest on the express or implied terms of the contract between mortgagor and mortgagee.[1] Other traces of the principle of *negotiorum gestio* can be found in our law[2] but these give us at the most a few curious exceptions to the main rule.

(2) General average contributions may fall under quasi-contract, but this is doubtful since the obligation to contribute is sometimes considered to arise from an implied term of the contract of affreightment.[3] These claims originated in maritime law and came to be handled by the common law courts when much of the jurisdiction of the Admiralty was taken over in the seventeenth century.[4] The rules of general average appear to have helped in the development of rights of contribution between sureties,[5] but the influence was slight and does not appear to have extended to other fields.

(3) Contracts of record are sometimes assigned to quasi-contract,[6] but there are good reasons for assigning these to other branches of our law.[7]

(4) Professor Winfield has cited certain cases to show that the courts have ordered a refund of money without reference to any implied contract.[8] Some of the cases he cites were indebitatus assumpsit, thus connoting an implied contract.[9] It is worth

[1] *Cotterell* v. *Stratton*, (1872) 8 Ch. App. 295, *per* Lord Selborne, L.C., at p. 302.

[2] A person who interferes with the estate of a deceased person for the purpose of burying the corpse does not become an executor de son tort; 11 Vin. Ab. 207 pl. 24; Bl. Comm. II, 507. The expenses of burial can be recovered from executors with assets, *Tugwell* v. *Heyman*, (1812) 3 Camp. 298, decided by Lord Ellenborough without precedents on the broad ground that someone must bury the corpse; approved and followed in *Rogers* v. *Price*, (1829) 3 Y. & J. 28. One who buries a wife living apart from her husband can recover burial expenses from the husband; established by *Jenkins* v. *Tucker*, (1788) 1 H.Bl. 90, followed in *Ambrose* v. *Kerrison*, (1851) 10 C.B. 776, and *Bradshaw* v. *Beard*, (1862) 12 C.B. (N.S.) 344.

[3] Winfield, *Province of Tort*, 139, 182.

[4] Gutteridge, *Doctrine of Unjustified Enrichment*, Camb. L.J. (1934), V, 224.

[5] *Deering* v. *Winchelsea*, (1787) 1 Cox 318, 2 Bos. & Pul. 268; this case is discussed at p. 56 above.

[6] Halsbury, *Laws of England*, 2nd ed. VII, s. 416. Jenks, *Digest*, s. 716.

[7] Winfield, *Province of Tort*, 149.

[8] Winfield, *Province of Tort*, 140, 141.

[9] Winfield, *Province of Tort*, 140, cites *Hastelow* v. *Jackson*, (1828) 8 B. & C. 221; this was a case of indebitatus assumpsit for money had and received. On pp. 140–1 Professor Winfield points out that "privity" has not

noting that the formal basis of indebitatus assumpsit was so often taken for granted that there might be no mention of implied contract.[1] As long as the forms of action lasted, whenever the court gave judgment for the plaintiff on an indebitatus count the court must have implied a contract, whether anything to that effect was said or not; the abolition of the forms of action has not affected the substantive law, although modern pleading practice may conceal what was formerly explicit.[2] The case of *Taylor* v. *Bowers* (1876),[3] cited by Professor Winfield, decided that where goods were handed over for an illegal purpose not yet carried out they could be recovered by action for conversion; this remedy is independent of implied contract, and the obligation of the recipient to restore the goods should probably be called quasi-contractual.[4]

been found in cases of waiver of tort (other than by Le Blanc, J., in *Foster* v. *Stewart*, (1814) 3 M. & S. 191), but I do not think that "privity" and "implied contract" are different names for the same thing; "privity" has been required only for certain types of case, p. 121 above.

[1] For instance, in *Kelly* v. *Solari*, (1841) 9 M. & W. 54, the problem before the court was the scope of "mistake of fact", and that problem was discussed without referring to any implied contract; the form of action was indebitatus assumpsit.

[2] Two cases since the Rules made under The Judicature Acts, 1873–5, are *Edmunds* v. *Wallingford*, (1885) 14 Q.B.D. 811, where *A*'s goods had been lawfully sold for *B*'s debt and *A* recovered their value from *B* on a plea of money received and money paid, and *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127, where money paid by mistake of fact was recovered on a plea of money had and received.

[3] 1 Q.B.D. 291, cited Winfield, *Province of Tort*, 140. Professor Winfield cites *Barclay* v. *Pearson*, [1893] 2 Ch. 154, in the same connection. I do not think that this case is any authority for the proposition that money deposited on an illegal lottery can be recovered independently of implied contract; the court said that such persons could recover their payments, but the court was concerned with whether a fund could be administered as a trust and the depositors were not parties to the action, except one who was joined as a defendant; return of what had been paid was not an issue.

[4] I have qualified my agreement with the proposition that such a claim is quasi-contractual, because the action of conversion is peculiar. If we regard the action here as resting on an obligation to restore the goods to the plaintiff, using the word "obligation" to mean a duty corresponding to a right *in personam* of the plaintiff, then that obligation may well be called quasi-contractual. If, however, the action of conversion is an assertion of ownership, resting on the plaintiff's right *in rem*, there appears to be no "obligation" of any kind. In Roman terminology, action of conversion is akin to both *vindicatio* and *condictio*, and it is worth remembering that the Romans found it convenient to allow *condictio* against thieves, Gaius, IV, 4.

It is therefore clear that Implied Contract does not cover the whole field of Quasi-contract; there are quasi-contractual claims that are not descendants of the old indebitatus counts. The number of quasi-contractual claims independent of implied contract is probably not large, unless some statutory obligations are included under the heading of quasi-contract.[1] No attempt is made to enumerate these cases here, for that could only be done as part of a treatise on the scope of quasi-contract in present-day law. Also, because these cases are a heterogeneous collection with no connecting link except their possible inclusion under the heading of quasi-contract, I have not considered it appropriate in this book to deal with their history.

SECTION 32

The name "Quasi-contract"

The name "quasi-contract" has become the general jurisprudential term for obligations which do not fall into the categories of contract or tort. Roman law, from which of course the nomenclature is taken, divided such obligations into quasi-contract and quasi-delict, the latter being mostly vicarious liability which in modern systems is dealt with under some other heading. When a term has an international jurisprudential meaning there is a great deal to be said for using such terms in municipal law. English practitioners should not be unacquainted with the terminology;[2] our law schools are undoubtedly responsible for lack of coherent information on this topic, but whether the phraseology seems queer or normal depends on whether Roman law is studied. One of the soundest arguments for some study of Roman law is that it enables lawyers of all systems to describe legal institutions in a language that is not the technicality of any particular system. That is a great ad-

[1] For instance, Third Parties (Rights Against Insurers) Act, 1930, may give an injured person a claim against the insurers of the actual wrongdoer. Such claim might be classed as quasi-contractual; but juristic analysis should not necessarily determine the rubrics for arrangement of law.

[2] The term has been used in our courts since the seventeenth century; early instances are *Speake* v. *Richards*, (1618) Hob. 206, pl. 260; *Mayor of London* v. *Gorry*, (1676) 3 Keb. 677; *Dalston* v. *Janson*, (1695) 1 Salk. 10. Quasi-contract is the heading of a chapter in Stephen's *Commentaries*.

vantage, so long as we do not forget that whilst say "quasi-contract" has the same broad meaning for all lawyers it will have a different content in detail for each system. In French nomenclature "quasi-contrat" covers certain cases specified in the Code Napoléon, and is not used to describe the more recent judge-made law called "enrichissement sans cause", which is of the same juristic species. When we add that an action for "enrichissement sans cause" is called "action de in rem verso", and contrasted with "quasi-contrat", the argument for using terms from Roman law is considerably weakened, if not destroyed.[1] Josserand, who considers that all the cases within or without the Code should be grouped under Unjust Enrichment, remarks: "Quasi-contrat, sorte de monstre légendaire qu'il faut se décider à bannir du vocabulaire juridique."[2]

The familiar English names are "Contract Implied in Law" and "Constructive Contract". Both show the historical setting of these cases, which is a doubtful asset when the historic link is merely a nuisance. "Contract implied in law" is probably the worst term. The word "implied" at once suggests a case where the ordinary elements of contract are present but not being expressed in words or writing are to be implied from the conduct of the parties. It would be easy to label this as a blunder, and insist that such contracts should be called "tacit", if some writers and judges had not used "implied" in this sense:[3] as it is, we have to recognise that "implied" is sometimes used to mean "tacit" and sometimes used to mean "implied in law". The expression "Constructive contract", used in Halsbury's *Laws of England*, is not likely to cause any such confusion. English lawyers are well used to the word "constructive" in the rules about "constructive notice" and "constructive total loss" in marine insurance.

Objection has been taken to all these names on the ground that they suggest an analogy which does not exist.[4] "Quasi" does undoubtedly carry such suggestion, which is prominent in

[1] For French law, see David, *Doctrine of Unjustified Enrichment*, Camb. L.J. (1934), v, 205.

[2] Josserand, *Cours de droit civil* (Paris, 1930), II, p. 5.

[3] The classic confusion is Bl. Comm. III, 161.

[4] Winfield, *Province of Tort*, 119.

the conception of "quasi-judicial proceedings" in administrative law. "Constructive" has less sense of analogy: "constructive notice", notoriously incapable of definition, cannot be completely explained by any intelligible analogy.[1] Still the sense of analogy is present.

It is customary to explain the names "contract implied in law" and "constructive contract" by referring to the forms of action, showing how such obligations were enforced by indebitatus assumpsit because it was a superior remedy.[2] That explanation is apt to overlook the fact that the word "contract" did not always bear its present meaning. Ames has pointed out that in Year Book language "contract" meant a duty arising from *quid pro quo*.[3] Coke used the Year Book language.[4] Blackstone gives a definition carrying the present connotation: "an agreement, upon sufficient consideration, to do or not to do a particular thing".[5] Medieval philosophy expected duties to be fixed by law; agreement could create obligations, but generally the content of those obligations would be defined by law. Seventeenth- and eighteenth-century political philosophy undoubtedly helped our law towards the conclusion that agreement could both create and define obligations, a proposition that was accepted as dogma by the Benthamite school. The first thoroughly systematic exposition of English law of contract defines a contract as "an agreement enforceable at law".[6] The essence of contract has thus come to be agreement,[7] whilst the essence of quasi-contract has remained a duty imposed by law irrespective of agreement. The connection between the two

[1] E.g. until 1925, the doctrine of *Patman* v. *Harland*, (1881) 17 Ch. D. 353.

[2] Comyn, *Law of Contract and Promises*, 1824, is an attempt to write a systematic treatise, but the forms of action so dominate the theme that contractual and quasi-contractual claims are not distinguished.

[3] Ames, *Lectures*, 123, n. 3.

[4] Co. Litt. 47 b.

[5] Bl. Comm. II, 442. In vol. III, 153, Blackstone gives another classification founded on forms of action.

[6] Pollock, *Principles of Contract*.

[7] Judgments and recognizances are still called contracts, but the attitude towards them is illustrated by Anson, *Law of Contract*, 17th ed. (1929), where they are described (at pp. 58–60) under the heading of Formal Contracts, followed by the statement (at p. 60) that "There is little of the true nature of a contract in the so-called Contracts of Record."

topics has grown less and less; the present link is merely the dogmatic "fictitious contract".

Perhaps the most serious objection to the terms "implied contract" and "constructive contract" is that both expressions suggest, if they do not actually signify, those claims derived from the indebitatus counts, to the exclusion of any other type of claim. It is for this reason that I have kept to the name Quasi-contract; whatever objection can be made to this term, it does at least avoid the risk of tying this branch of English law to "fictitious contract".

INDEX

Account, action of, 6, 9, 25, 26, 28, 31, 43
  auditors, 9, 11
  bailiff, 10
  Blackstone, 105
  debt, 22–3, 25, 31, 34–5, 105
  defects, 21, 36, 96
  defences, 10
  disseisor, 12, 14
  indebitatus assumpsit, 96, 103
  joint tenants, 18
  nature of, 36 seq.
  pleading, 10, 15
  privity, 9, 15, 16, 17, 34, 93
  purpose of, 9
  receiver, 10
  tenants in common, 18
  trust, 31, 97
  wrongdoers, 10 seq., 73
Account stated, 27, 105–11
  admissions, 107, 109–10
  contract, 109, 110
  pleading, 106, 109–11
Actions, compromise of, 69
  election of, 75, 81–4
  real and personal, 82
  See also under names of writs
Admission of debt, 107, 109–10
Aequum et bonum, 118, 119, 121
Agency, 26, 30, 100–1, 104, 111–17
  illegal contract, 115–16
  of necessity, 117
  payment to agent, 113
  warranty of authority, 111–13
Ames, J. B., 14, 19, 23, 36, 40, 42, 75, 129
Assignment of chose in action, 97, 102
Assumpsit, action of, 24, 29, 30, 40, 42, 46, 75, 82, 94, 119; *see also* Indebitatus assumpsit
Attorney, 107
Audita querela, writ of, 66

Bail, 54
Bailiff, 10, 33
Bailment, 13, 24
Barbour, W. T., 14
Bill of exchange, 94–5
Bills in Eyre, 8, 20
Blackstone, 50, 105, 119, 129
Bracton, 6, 23
Bribery, 89
Brooke, 12, 13, 14, 15, 16, 25, 31
Buller, 49, 119

Carrier, common, 29, 117
Case, action upon, 7, 8, 9, 17, 23, 26, 29, 62, 82, 94
Cause of action, 106, 109–11
Chose in action, assignment of, 97, 102
Coke, 16, 17, 18, 129
Compulsory payments, 7 seq., 64 seq.
  agents, 113–15
  distress, 71–2
  process of law, 66–71
  See also Payment of another's debt
Consideration, account stated, 109, 110
  failure of, 18 seq., 43, 84 seq.
  failure of, in equity, 19, 20, 23
  illegal, 88–93
  indebitatus assumpsit, 42–5
  past, 46
  precedent request, 46
Contract, 101–2
  account stated, 109, 110
  breach of, 85–6
  constructive, 128–30
  damages, 86–7
  discharge, 85–6
  early meaning, 3, 129
  executory, 91–2
  fictitious, 122, 130
  fraud, 84, 91
  illegal, 59, 88–93, 104, 108, 26
  illegal, agency, 115–16
  implied, 42, 117 seq.
  marriage brokage, 92
  principal and collateral, 47
  record, 28, 125
  sale of land, 86–7
  stakeholder, 104
  unenforceable, 107, 110
  See also Consideration

Contribution, 4 seq., 55 seq.
equity, 56
indebitatus assumpsit, 56–7
joint tortfeasors, 57
surety, 55–7, 125
Conversion, 126
Court of High Commission, 65
Court of Requests, 24
Courts of Fairs, 4, 24
Covenant, action of, 4–5, 19, 20
Custom, money due on, 29, 43

Debt, action of, 6, 20, 21, 22–3, 25, 26, 27, 28, 29, 30, 32, 40, 42–3
account, 22–3, 25, 31, 34–5
indebitatus assumpsit, 29, 42–3
privity, 93
Deceit, 73–5; *see also* Waiver of tort
Deed, 20, 22, 108
Detinue, action of, 6, 7, 8–9, 21, 24, 25, 27, 29, 30, 32, 34
Dicey, 122
Disseisin, 11, 13, 62
account, 14
by election, 12, 13
wardship, 12
Distress, 6, 48, 51, 52, 53, 71–2
Drunkard, 119

Ejectione custodiae, writ of, 12
Ejectment, action of, 75
Election of actions, 81–4
Equity, account, 36
consideration, failure of, 19, 20, 23
contribution, 5, 55–6
extortion, 8, 9
fraud, 8, 9
illegal contract, 91
indemnity, 4
mistake, 7
tracing order, 123
See also Trust
Estoppel, 64, 75, 78, 101
Executors, 21, 36, 63–4, 73, 81, 114
Extortion, *see* Compulsory payments

Fictions, 122–4
Fieri facias, writ of, 48
Fitzherbert, 3, 10, 13
Forms of action, 3; *see* under names of writs
Fraud, 7 seq.; *see also* Deceit
contract, 84, 91
inducing mistake, 58

General average, 125
Goods, delivered to defendant for benefit of plaintiff, 30
deposited for a particular purpose, 24 seq.
Guardian, chivalry, 12, 15
socage, 10, 12, 73

Hanbury, H. G., 118
Holdsworth, Sir William, 40, 84

Indebitatus assumpsit, action of, account stated, 105
consideration, 42–5
debt, 29, 42–3
failure of consideration, money paid on, 18, 84 seq.
fraud, 9
illegal consideration, money paid on, 88 seq.
implied contract, 42, 117 seq.
mistake, payment by, 58
nomenclature, 105–6
origin, 39–41
pleading, 44
privity, 17, 55, 95, 98, 99, 103
specified sum of money, 48–9, 77, 79–80
stakeholder, 103
See also Contribution, Money paid, Money received from third person for benefit of plaintiff, Payment of another's debt, Waiver of tort
Indemnity, 4 seq.
Infant, 119
Innkeeper, 29
Insimul computasset, 105–7
Insurance premiums, 49, 59, 87, 92

Joint tenants, 18
Joint tortfeasors, 5, 57
Judgment, 28, 66, 82, 84

Labourers, Statutes of, 24
Landon, P. A., 118
Langdell, C. C., 32 seq.
Limitations, Statutes of, 81
Lunatic, 119

Mesne, writ of, 5
Mistake, payments by, 6 seq., 43, 58 seq., 87
account, 6

Mistake, payments by
agents, 113–15
debt, 6
detinue, 6
equity, 7
indebitatus assumpsit, 58
induced by fraud, 58–9
of law, 59–61
trespass, 6
Money deposited for particular purpose, 24 seq.
Money had and received, basis of claim, 117–24
meaning of "money", 79–80
See also Indebitatus assumpsit
Money paid, 46–7
basis of claim, 117–24
implied request, 49–51
meaning of "payment", 48–9
pleading, 49
request of defendant, 30, 47–8
See also Contribution, Payment of another's debt
Money received from third person for benefit of plaintiff, 30 seq., 93 seq.
account, 31
agency, 100–1
appropriation, 99, 101
assignment, 97, 102
assumpsit, 93–4
contract, 101–2
debt, 31
estoppel, 96, 101
indebitatus assumpsit, 94 seq.
privity, 31, 93, 98 seq., 121
trust, 31, 97, 103
Mortgagees, 124

Negotiorum gestio, 124–5
Novation, 102

Office, disturbance of, 9, 61–3, 73, 76
Official duty, money due on, 29

Payment of another's debt, 51–5
compulsion, 51–2
privity, 55, 121
relief of defendant, 52–4
Pike, L. O., 21
Pleading, account, 10, 15
account stated, 106, 109–11
indebitatus assumpsit, 44, 106
Pleading
insimul computasset, 106
money paid, 49
waiver of tort, 75, 80–1
Port dues, 45
Privity, 121–2
account, 9, 15, 16, 17, 34, 93
debt, 93
indebitatus assumpsit, 17, 55, 95, 98, 99, 103
Process of law, 66–70
Professional duties, 29
Public calling, 29

Quantum meruit, 27, 88, 105
Quasi-contract, nomenclature, 127 seq.
scope, 124 seq.

Receiver, 10
Record, contract of, 28, 125
Rent, wrongful collection of, 12, 13, 62–3
Replevin, action of, 7, 71
Roman law, 6, 18–19, 24, 28, 127

Salmond, Sir John, 119
Salvage, 124
Sheriff, 29, 40, 45, 78
Stakeholder, 26, 31, 92, 103–4
Statham, 14
Statute, money due on, 29, 43
Story, Judge, 112
Supersedeas, 66
Suretyship, 4–5, 55 seq.; *see also* Contribution

Tenant by elegit, 12
Tenants in common, 18
Tort, waiver of, *see* Waiver of tort
Tortfeasors, joint, 5, 57
Trespass, action of, 6, 7, 8, 71, 75, 76
Trover, action of, 65, 73, 75, 76, 78, 82, 83
Trust, common law, 31, 96–7
money had and received, 103
rights of trustees, 124

Ultra vires, 119, 120

Voluntary payment, 60, 65

Wager of law, 21–2, 28, 36
Waiver of tort, 9 seq., 61 seq.

Waiver of tort
account, 9 seq.
assault, 80
avoidance of statutory limitations, 81
compulsory payments, 64–72
deceit, 58, 70, 73–5, 84
disturbance of office, 61–3, 72, 73, 76
election, 81–4
indebitatus assumpsit, 61 seq.
Waiver of tort
libel, 80
"money" received, 79
pleading, 75, 80–1
rents, wrongful collection of, 12, 13, 62–3
scope of waiver, 76–81
trespass, 67, 75–6, 78
trover, 67, 72–3, 77, 78, 79, 82
Winfield, Prof. P. H., 88, 118, 121, 125, 126

CAMBRIDGE: PRINTED BY W. LEWIS, M.A., AT THE UNIVERSITY PRESS